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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILD WAVES, LLC, PETITIONER

v.

NICKELS MIDWAY PIER, LLC

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court below failed to respect state law in ruling that Wild Waves was not entitled to the remedy of specific performance, on a matter where state law governed the availability of that remedy.

II. Whether the Court below failed to afford "full faith and credit" to the prior ruling of the Superior Court of New Jersey as to a matter entrusted by the Bankruptcy Court to that Court for resolution.

RULE 29.6

Petitioner, pursuant to Rule 29.6, states that it is a privately held company. There is no publicly held corporation that owns more than 10% of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 ii

TABLE OF AUTHORITIES .....

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 3

REASONS FOR GRANTING THE PETITION 4

CONCLUSION 8

APPENDIX

Circuit Court Opinion (11/27/2007) 1a
District Court Opinion (4/24/2006) 12a
Bankruptcy Court Order Denying Motion to Reconsider (11/2/2005) 41a
Bankruptcy Court Order Granting in Part, Debtor's Motion to Reject Executory Contract (9/14/2005) 42a
Bankruptcy Court Memorandum Opinion (9/1/2005) 44a
Order Denying Petition for Rehearing (1/2/2008) 72a

TABLE OF AUTHORITIES

Page

CASES

DIXON V. SMYTH SALES CORP., 166 A. 103, 104 (N.J. 1933)....8

FRIENDSHIP MANOR, INC. V. GREIMAN, 581 A.2D 893, 897 (N.J. APP.DIV. 1990) 7

IN RE BEN FRANKLIN HOTEL ASSOCS., 186 F.3D 301 (3D CIR. 1999) 4, 5, 6

IN RE KMART CORP., 290 B.R. 601, 608 (BANKR. N.D.ILL. 2002) 5

IN RE LAVIGNE, 114 F.3D 379, 387 (2D CIR. 1997) 5

STATUTES

11 U.S.C. § 101(5)....5

11 U.S.C. § 101(5)(B) (2003)....1

11 U.S.C. § 365(g) (2003)....2, 5

28 U.S.C. § 1254(1)....1

28 U.S.C. § 1738 ....2, 8

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 2007 WL 4171114 (3d Cir. Nov. 27, 2007). The opinion of the United States District Court for the District of New Jersey is reported at 341 B.R. 486 (D.N.J. 2006). The opinion of the United States Bankruptcy Court for the District of New Jersey is reported at 332 B.R. 262 (Bankr. D.N.J. 2005).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit, affirming the decision of the district court's order reversing the bankruptcy court's order, was handed down on November 27, 2008. A timely petition for rehearing was denied on January 2, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Art. IV, § 1

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Bankruptcy Code, 11 U.S.C. § 101(5)(B) (2003):

(5) "claim" means –
* * *

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured[.]

Bankruptcy Code, 11 U.S.C. § 365(g) (2003):

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease –

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12 or 13 of this title, immediately before the date of the filing of the petition . . . .

Judiciary and Judicial Procedure, 28 U.S.C. § 1738:

The Acts of the legislature of and State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certification of a judge of

the court that the said attestation is in proper form.

Such Act, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the court of such State, Territory or Possession from which they are taken.

STATEMENT

This appeal involves the enforcement of an Agreement of Sale (the "Agreement of Sale") between appellee, Nickels Midway Pier, LLC ("Debtor"), and Wild Waves by which Debtor agreed to sell to Wild Waves a parcel of real estate used as an amusement pier located in Wildwood, New Jersey (the "Real Estate"). Shortly after the petition date, Debtor sought to reject what it characterized as a lease between the parties. Wild Waves asserted that its rights were that of a purchaser and sought relief from the automatic stay to proceed with a determination of this issue before the Superior Court. The Bankruptcy Court granted Wild Waves' motion and charged the Superior Court to determine the nature of the relationship between the parties. The Superior Court ruled that there existed a "thoroughly integrated" agreement to sell the real estate based upon consideration of the intent of the parties in the face of the two memoranda of agreement.

On appeal, the Third Circuit held that monetary damages were an "alternative" remedy for a vendor's breach of an agreement to sell real estate -- regardless

of whether the alternative was a "viable" remedy under state law -- and affirmed the denial to Wild Waves of specific performance of the Agreement of Sale. It also affirmed the decision of the District Court, which held, contrary to the decision of the Superior Court of New Jersey, that the agreement to sell the real estate was not unitary but divisible into sale and lease component contracts.

This Petition seeks to have the Court review the denial of the right of specific performance in bankruptcy cases where that right is clearly afforded under the law of New Jersey. This Petition also seeks to require that the Court below afford full faith and credit to the decision of the New Jersey Superior Court.

REASONS FOR GRANTING THE PETITION

As to the first question presented for review, although the proper legal standard was noted by the Third Circuit, *In re Ben Franklin Hotel Assocs.*, 186 F.3d 301 (3d Cir. 1999) ("Ben Franklin"), which requires that damages be a "viable alternative" remedy to specific performance, the Third Circuit disregarded settled New Jersey law in holding that monetary damages satisfied this standard in the context of an agreement of sale for a specific use complex irrespective of whether monetary damages were a viable alternative.

Rejection of an executory contract pursuant to § 365 of the Code does not destroy the non-debtor's right to damages (although they may be reduced to a pre-petition claim) or, where appropriate, specific

performance since the Code does not displace state law remedies unless the Code expressly provides otherwise. Rather, rejection of a contract has the legal effect of a breach. *See* 11 U.S.C. § 365(g). The availability of the right to specific performance upon a debtor's breach, when that remedy would be available under state law, turns on the meaning of "claim" under § 101(5)(B) of the Code.

The Code defines "claim" broadly to reduce as many of a debtor's obligations as possible to monetary damages, and thus subject to a discharge. A "claim" is defined as not only a "right to payment" but also a "right to an equitable remedy for breach of performance **if such breach gives rise to a right to payment** ...." 11 U.S.C. § 101(5) (emphasis added). When a contract is rejected, the non-debtor party's claim is determined according to state law. *See In re Lavigne*, 114 F.3d 379, 387 (2d Cir. 1997), *In re Kmart Corp.*, 290 B.R. 601, 608 (Bankr. N.D.Ill. 2002) (whether mitigation of damages reduces a lessor's damages is governed by state law). Where specific performance is an available remedy, that remedy is excluded from discharge as a § 101(5)(B) "claim."

The United States Court of Appeals for the Third Circuit upholds the availability of specific performance to a non-debtor party as a remedy for the debtor's breach of an agreement where money damages are not a "viable alternative" to specific performance. *Ben Franklin*, 186 F.3d 301. In *Ben Franklin*, the non-debtor party alleged a breach of contract and sought an equitable remedy, specifically the reinstatement of its partnership interest in the Ben Franklin Hotel development project. The relevant inquiry, under

Supreme Court precedent, was "whether monetary payment is a **viable** alternative for [the non-debtor's] proposed equitable remedy of reinstatement of its partnership interest." *Id.* at 306 (emphasis added).

Applying the "viable alternative" test, *Ben Franklin* held that monetary damages were **not** a viable alternative to equitable relief for the loss of the partnership interest and allowed the claim to specific performance to go forward. The Court noted that the primary asset of the limited partnership was a piece of real property that was a "well known landmark" and that the development of that property "clearly constitutes a unique business opportunity for its owners." The Court, summarizing Pennsylvania law, held that "money damages are generally not regarded as adequate remedy for the loss of such a business opportunity." *Id.* at 307. Since monetary damages were not an adequate substitute for an equitable remedy, they were held not to be a "viable alternative" to specific performance. As a result, the equitable claims did not constitute a section 101(5)(B) "claim" discharged in debtor's bankruptcy proceedings.

New Jersey law is emphatic under the circumstances presented in this case. Under New Jersey law, a vendor's breach of an agreement to convey real estate is remediable by specific performance. In fact under New Jersey law there is:

> a virtual presumption, because of the uniqueness of land and the consequent inadequacy of monetary damages, that specific performance is the buyer's appropriate remedy for the vendor's breach of the contract to convey.

Friendship Manor, Inc. v. Greiman, 581 A.2d 893, 897 (N.J. App.Div. 1990) (emphasis added). The "virtual presumption" of specific performance under New Jersey law is even stronger than the Pennsylvania standard for granting specific performance at issue in *Ben Franklin*.

The Court below erred in upholding the adequacy of monetary damages as a matter of state law when it determined that specific performance was inappropriate. The Court was presented with an exceptional example of the inadequacy of money damages to remedy Debtor's failure to convey real estate. The Real Estate is undeniably unique, consisting of a Boardwalk property in Wildwood, New Jersey suitable for an amusement facility on which Wild Waves constructed an elaborate "water park" which cost over $5 million. Moreover, without obtaining title to the Real Estate, Wild Waves would lose the ability to develop and operate the Real Estate as one entity.

Clearly, such a property, having a specialized use, in a specialized location and employing a specialized set of improvements, represented a "unique business opportunity" certainly as unique (arguably more unique), than the asset at issue in *Ben Franklin*. Wild Waves thus was an **a fortiori** case for specific performance. Notwithstanding its citation of *Ben Franklin*, however, the Court below disregarded the "viable alternative" remedy standard and thus did not consider the "virtual presumption" under New Jersey law that specific performance was the appropriate remedy. It thus read out the governing state law, which would hold as a matter of law that monetary

damages were inadequate, and deprived Petitioner of its right to the remedy of specific performance.

As to the second question presented for review, in determining whether a contract existed, the Superior Court had to determine the intent of the parties which necessarily included a determination of whether the contract was unitary or divisible. The Superior Court considered evidence related to the events leading up to the formation of the contract and the intended terms, as required under New Jersey law, since whether the contracts are unitary or divisible is an issue inseparable from the terms of the contracts themselves. *See Dixon v. Smyth Sales Corp.*, 166 A. 103, 104 (N.J. 1933) (if the evidence presented shows the parties intended a single contract, it is an unitary contract).

The Superior Court, after properly considering evidence presented and the written contracts, determined that the parties entered into a unitary contract. That conclusion was based upon a factual finding by the Superior Court that a lease, standing alone, made no economic sense. The Court below, affirmed what was in effect the District Court's reversal of the Superior Court's determination that the agreement was not divisible, and thus ignored the Superior Court's findings and crafted its own factual findings. In doing so, it failed to afford full faith and credit to the Superior Court's opinion. *See* U.S. Const. Art. IV, § 1, 28 U.S.C. § 1738.

CONCLUSION

For the above and forgoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari

to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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No. 06-2671

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

IN RE: NICKELS MIDWAY PIER, LLC, Debtor; WILD WAVES, LLC, Appellant

Appeal from the United States District Court for the District of New Jersey. (D.C. Civil Action No. 05-cv-05514). District Judge: Honorable Joseph E. Irenas.

September 26, 2007, Argued

November 27, 2007, Opinion Filed

NOTICE: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

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JUDGES: Before: AMBRO, JORDAN and ROTH, Circuit Judges.

OPINION

AMBRO, Circuit Judge

Wild Waves, LLC ("Wild Waves") appeals the decision of the District Court that debtor Nickels Midway Pier, LLC ("Nickels") could reject its agreement to sell a pier property to Wild Waves. It claims the sale agreement was repudiated prepetition by Nickels, and therefore was not executory and hence not eligible for rejection. Even were rejection of the sale agreement appropriate, Wild Waves maintains it was denied the protections of § 365(i) of the Bankruptcy Code for putative purchasers of real property. Wild Waves also argues that the District Court erred by holding that rejection of the sale agreement under federal law extinguishes its state-law claim to specific performance, as monetary damages are not adequate.[1] For the reasons noted below, we affirm.

I. Procedural Background

In 2001 Nickels filed suit against Wild Waves in New Jersey Superior Court, Chancery Division, alleging that Wild Waves had failed to perform its obligations under a lease between the two parties pertaining to an entertainment pier in Wildwood, New Jersey (the "Pier"). Wild Waves counter-claimed, contending that

Nickels had failed to perform its obligations under an oral contract for the sale of the Pier and sought the remedy of specific performance. That action remained pending in December 2003 when Nickels filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, et seq. Nickels moved to reject the lease of the Pier under 11 U.S.C. § 365(a).[2] The Bankruptcy Court did not resolve the motion at that time, but granted relief from the automatic stay to permit the New Jersey Superior Court to determine whether the parties had agreed to the sale of the Pier.

The Superior Court understood its charge to be to determine whether "an enforceable oral contract [of sale] existed." It answered yes to that question. It also concluded that the terms of that oral agreement were included in a document negotiated, but not signed, by the parties, and that the agreement to lease and to sell the Pier was a single, integrated contract:

> I am, therefore, satisfied, beyond any hesitation, that Nickels Midway Pier and Wild Waves had reached an agreement that would require Wild Waves to lease a portion of the Pier for a three year period and thereafter purchase it in accordance with the terms of [the unexecuted agreement to sell the Pier]. I am further certain that the lease and sale were two aspects of a thoroughly integrated agreement. Although only the portion of [the] agreement respecting the lease was committed to an executed writing, I remain absolutely convinced that these parties intended to be bound as to the sale, even in the absence of an executed writing. Counsel for Nickels stated at oral argument that

> Nickels had sought leave to file an interlocutory appeal of the Superior Court's decision, but that this request was denied.

In light of the Superior Court's conclusion, the Bankruptcy Court construed Nickels' motion to reject as seeking to reject a single, comprehensive agreement. The Bankruptcy Court concluded that Nickels is entitled to reject this agreement pursuant to Section 365(a) because it remains executory, that such a rejection was the product of reasonable business judgment, and that Wild Waves asserted a claim that can be discharged in bankruptcy. The Bankruptcy Court also concluded that Wild Waves is a purchaser in possession of the Pier and therefore is entitled to the protections provided by Bankruptcy Code § 365(i).[3]

The parties cross-appealed to the District Court. It disagreed with the Bankruptcy Court on the threshold question of how to treat, for the purposes of bankruptcy law, the agreement to lease and to sell the Pier. It concluded that the Bankruptcy Court should have construed the agreement to lease and to sell the Pier as comprising two independent contracts or, in the alternative, as divisible portions of an integrated agreement. The sale agreement aspect was executory, and thus could be rejected by Nickels. Moreover, Wild Waves was not entitled to the protections provided by Section 365(i) because it was not a purchaser in possession but rather was in possession of a portion of the Pier under its lease rights. The District Court remanded the case to the Bankruptcy Court with instructions to consider independently the attempt to reject the agreements to lease and to sell the Pier.

Finally, the District Court affirmed the Bankruptcy Court's "determination that Wild Waves' claim for specific performance of the oral contract for sale is a claim within the meaning of . . . [Bankruptcy Code] § 101(5), and thus can be discharged in a bankruptcy proceeding." Dist. Ct. Op. at 23. Wild Waves timely appeals to us.[4]

II. Discussion

A. Is the Sale Agreement Executory and thus Subject to Being Rejected?

Before we consider whether the oral sale agreement is executory, we deal with the preliminary issue of whether the lease and the sale agreement are non-divisible aspects of the same contract, divisible segments of a single contract, or independent contracts. The answer lets us know if we can analyze the oral sale agreement or whether it is bundled with the lease so inextricably that we must consider them together. Once we determine this issue, how does it affect, if at all, whether we have in place the predicate for a contract that can be rejected under § 365(a); in other words, is the contract executory?

Under New Jersey law, "a contract is said to be divisible when performance is divided in two or more parts with a definite apportionment of the total consideration to each part." *Integrity Flooring v. Zandon Corp.*, 130 N.J.L. 244, 32 A.2d 507, 509 (N.J. 1943). The divisibility of a contract "depends upon the intention of the parties as gathered from the agreement itself and the circumstances surrounding it." *Id.* As the District Court explained, the portions of the parties'

agreement pertaining to the lease and the purchase of the Pier are supported by separate consideration. Neither agreement was made contingent upon performance of the other, nor are rental payments considered payments toward the sale price. Accordingly, we affirm the District Court's conclusion that, to the extent that it treated the agreement between the parties as a single contract, the Bankruptcy Court should have treated that contract as divisible into separate portions relating to the lease and the sale of the Pier.[5] Thus the agreement to sell the Pier is considered alone, as we follow the approach of other courts that have considered divisible portions of a contract separately in deciding whether a contract remains executory. *See, e.g., In re Wolflin Oil, L.L.C.*, 318 B.R. 392, 399 (Bankr. N.D.Tex. 2004); *Matter of GP Exp. Airlines, Inc.*, 200 B.R. 222, 228-29 (Bankr. D.Neb. 1996); *In re Plum Run Serv. Corp.*, 159 B.R. 496 (Bankr. S.D.Ohio 1993).

A sale contract must be executory to permit rejection under Bankruptcy Code § 365(a). Under *Sharon Steel Corp. v. National Fuel Gas Distribution Corp.*, 872 F.2d 36, 39 (3d Cir. 1989), executory contracts are those "under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." That is the case here, for the failure of Nickels to sell the Pier to Wild Waves would no doubt breach materially the sale agreement.

Wild Waves counters that the agreement to sell the Pier no longer is executory because it was allowed under New Jersey law the option of treating that

agreement as terminated after Nickels' alleged anticipatory repudiation and it exercised that option. Merely alleging anticipatory breach is not enough, as no one of the Superior Court, the Bankruptcy Court, or the District Court concluded that the sale agreement in fact was repudiated by Nickels in anticipation of a possible sale.[6] Accordingly, we have no support for the argument that the sale agreement does not remain executory.

B. Is Wild Waves Entitled to the Protections of § 365(i) of the Bankruptcy Code?

Having decided that Nickels is entitled under Bankruptcy Code § 365(a) to reject the agreement to sell the Pier, we next consider whether Wild Waves is entitled to the protections provided by § 365(i). We agree with the District Court that Wild Waves was in possession of the Pier under the lease portion of the agreement between the parties. Because it has not made payments toward the purchase of the Pier, Wild Waves is not in a position to "continue to make all payments due" within the meaning of § 365(i)(2)(A), and is not a purchaser in possession under § 365(i)(1). Accordingly, we affirm the conclusion of the District Court that Wild Waves is not entitled to the protections of § 365(i).[7]

C. Is Wild Waves' Action for Specific Performance a Claim Under the Bankruptcy Code?

Wild Waves argues that its action for specific performance of the agreement to sell the Pier cannot be characterized as a claim within the meaning of Bankruptcy Code § 101(5) and thus is not subject to

discharge in bankruptcy. Section 101(5)(B) includes the "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." Interpreting this provision in light of *Ohio v. Kovacs*, 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649 (1985), we have explained that equitable relief may be treated as a claim for purposes of the Bankruptcy Code when granting monetary damages is a "viable alternative." *In re Ben Franklin Hotel Assocs.*, 186 F.3d 301, 305-06 (3d Cir. 1999). As compensatory, or "benefit of the bargain," damages available under New Jersey law present an alternative to equitable relief under the facts of this case, *see Donovan v. Bachstadt*, 91 N.J. 434, 453 A.2d 160, 165 (N.J. 1982), we conclude, along with the District Court, that Wild Waves asserts a claim within the meaning of Bankruptcy Code § 101(5)(B).[8]

* * * *

We affirm the order of the District Court.

Footnotes

[1]For reasons that are unclear, Wild Waves makes these arguments in a sequence different from ours. It puts first its § 365(i) argument that it possesses the pier pursuant to the sale agreement, followed by the contention that its state-law right to specific performance is not a claim under the Bankruptcy Code, and then reverts back to whether the sale agreement is executory. Perhaps Wild Waves prioritizes the relative strength it perceives as to those arguments, or perhaps its lays out in order what it really wants.

[2] Section 365(a) refers exclusively to the power of a trustee to reject or assume executory contracts or leases. *See* 11 U.S.C. § 365(a) (providing in relevant part that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor"). However, a "debtor in possession" has all but a very limited set of the rights and powers of a trustee, and a debtor is considered a "debtor in possession" when, as in this case, no trustee has been appointed. *See* 11 U.S.C. § 1107 (describing powers and rights of a "debtor in possession"); 11 U.S.C. § 1101(1) (defining "debtor in possession").

[3]This provision provides in relevant part:

> (1) If the trustee rejects an executory contract of the debtor for the sale of real property . . . under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property . . . .
>
> (2) If such purchaser remains in possession –
>
> > (A) such purchaser shall continue to make all payments due under such contract, but may . . . offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

> (B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract. 11 U.S.C. § 365(i).

[4]We have jurisdiction pursuant to 28 U.S.C. §§ 158(d) & 1291. Our review is plenary. *Sovereign Bank v. Schwab*, 414 F.3d 450, 452 n.3 (3d Cir. 2005). On appeal from the District Court's decision in its bankruptcy appellate capacity, we exercise the same standard of review as the District Court, *id.*; it reviewed the Bankruptcy Court's legal determinations *de novo* and its factual determinations for clear error.

[5]Because we affirm this conclusion of the District Court, we need not consider its alternative conclusion that the Bankruptcy Court should have treated the agreement between the parties as consisting of two separate contracts for the Pier's lease and sale. Indeed, if we were to consider that alternative, we would find it difficult to ignore the findings of intent that the Superior Court laid out in its careful and thorough conclusions following trial.

[6]Nickels argues unpersuasively that it could not have anticipatorily breached the agreement to sell the Pier because it did not acknowledge the existence of such a contract. We will not add the acknowledgment of a contract to the elements of an anticipatory repudiation claim. *See Ross Sys. v. Linden Dari-Delite, Inc.*, 35 N.J. 329, 173 A.2d 258, 264-65 (N.J. 1969) (describing requirements for anticipatory repudiation under New Jersey law).

[7]As that Court concluded, the Bankruptcy Court should consider on remand the availability to Wild Waves of the protections provided by other Code sections, including § 365(h), which pertains to the rejection of an unexpired lease of real property if that rejection attempt by Nickels goes forward on remand.

[8]We are not suggesting that money damages are the equivalent of realty or are a viable alternative in every case. We merely note that when damages can be considered an alternative to specific performance, as we believe they can under the circumstances presented here, the Bankruptcy Code provides a mechanism for addressing the claim for relief.

CIVIL ACTION No. 05-5514 (JEI)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

In re: NICKELS MIDWAY PIER, LLC, Debtor. NICKELS MIDWAY PIER, LLC, Appellant / Cross-appellee, v. WILD WAVES, LLC, Appellee / Cross-appellant.

April 24, 2006, Decided

COUNSEL: TEICH GROH, By: Brian W. Hofmeister, Esq., Michael A. Zindler, Esq., Trenton, New Jersey, Counsel for Nickels Midway Pier, LLC.

SHERMAN, SILVERSTEIN, KOHL, ROSE & PODOLSKY, By: Fredric R. Cohen, Esq., Pennsauken, New Jersey, Counsel for Nickels Midway Pier, LLC.

COZEN O'CONNOR, By: Arthur J. Abramowitz, Esq., Jerrold N. Poslusny, Jr., Esq., Cherry Hill, New Jersey, Counsel for Wild Waves, LLC.

JUDGE: JOSEPH E. IRENAS, S.U.S.D.J.

OPINION

IRENAS, Senior District Judge:

This matter comes before the Court on the appeal of Debtor Nickels Midway Pier, LLC ("Nickels") and cross-appeal of Wild Waves, LLC ("Wild Waves"), from the Bankruptcy Court's order of September 14, 2005, authorizing Nickels to reject an executory contract with Wild Waves, pursuant to *11 U.S.C. § 365(a)*, and

holding that Wild Waves is entitled to the protections set forth in *§ 365(i)*.

I.

Nickels is a real estate purchasing, leasing and management company. Nickels owns a pier located at 3500 Boardwalk, Wildwood, New Jersey ("Pier"), which it purchased in 1976. In or about the early spring of 1999, Nickels entered into a written lease agreement ("Lease") with Wild Waves, in which Wild Waves would lease 70% of the Pier ("leased premises") for the purpose of constructing and operating a water park. [1] (*See* Lease; Nickels Appendix: [2] 19-30)

The Lease specifies a term of approximately sixteen years, beginning on May 15, 1999, and terminating on December 31, 2014. (Lease at ¶ 3; NA:20) The Lease also provides that Wild Waves may extend the Lease for three additional five-year terms. (Lease at ¶ 34; NA:27) Nickels was required to give possession of the leased premises to Wild Waves on October 1, 1999, although Wild Waves was permitted limited access to the leased premises before that date. (Lease at ¶¶ 7, 10; NA:21-22) Wild Waves was obligated to make five rental payments of $ 50,000 each year, beginning on January 1, 2000, with an increase in rent effective January 1, 2003. (Lease at ¶ 4; NA:20) Wild Waves was also required to pay annually to Nickels one-third of the real estate taxes for the entire Pier. (Lease at ¶ 9; NA:21)

The Lease includes a provision in which Nickels acknowledges that Wild Waves will be seeking financing to construct a water park on the Pier and permits a lien to be placed on the Pier by Wild Waves'

financing institution. (Lease at ¶ 20(c); NA:25) The provision specifies that Nickels is not obligated to assume personal responsibility for the payment of the lien or to subordinate any existing mortgage to the lien of Wild Waves' financing institution. (Id.)

The Lease does not mention any agreement between the parties that Nickels would sell the entire Pier to Wild Waves. Wild Waves asserts, however, that it also had an oral agreement with Nickels to buy the Pier in 2003. A written document entitled Agreement for the Sale of Real Estate (hereinafter "Agreement for Sale") was prepared but was not executed, as it was not signed by a representative of Nickels. (Agreement for Sale; NA:48-62) Nickels maintained that it never agreed to sell the Pier to Wild Waves. Wild Waves never furnished any payment called for by the Agreement for Sale and Nickels never delivered the deed.

On September 29, 1999, the parties agreed to several amendments to the Lease which were memorialized in a written and executed document entitled Amendment to Lease. (NA:488-89) The amendments include a provision obligating Wild Waves to pay $ 400,000 as additional collateral in consideration of Nickels permitting Wild Waves to encumber the Pier in order to obtain financing for the water park. (Id.) Nickels was obligated to hold the money as collateral until Wild Waves' mortgage from Sun Bank matured in or about 2004, but could use the money in the interim to cure any defaults by Wild Waves on the Sun Bank mortgage. (Id.) The Amendment to Lease does not mention any agreement to sell the Pier.

In 2001, Nickels instituted a civil action against Wild Waves in New Jersey Superior Court, Chancery Division ("State Court Action"). [3] Wild Waves filed a counterclaim in the State Court Action seeking a determination that an oral contract for sale of the Pier existed between the parties.

Before the State Court Action could be resolved, Nickels filed for chapter 11 bankruptcy on December 8, 2003. On December 16, 2003, Nickels filed a motion to reject the Lease, pursuant to *11 U.S.C. § 365* ("Motion to Reject"). Wild Waves filed a motion for stay relief to pursue its counterclaim in the State Court Action, which the Bankruptcy Court granted on February 20, 2004. The Bankruptcy Court also reserved its decision on the Motion to Reject until the resolution of the State Court Action.

In a letter opinion dated April 12, 2005, Presiding Judge George Seltzer of the Superior Court, Chancery Division, held that an oral contract for sale of the Pier existed between Nickels and Wild Waves. *Nickels Midway Pier v. Wild Waves*, No. CPM-53-01 (N.J. Super. Ct. Ch. Div. Apr. 12, 2005) (hereinafter "Letter Op.") Judge Seltzer held that the contract for sale required Nickels to sell and Wild Waves to buy the Pier for a price of $ 5.5 million in 2003. (Letter Op. at 1) Wild Waves was to pay $ 3.490 million [4] in cash with Nickels taking back a $ 2 million mortgage. (Letter Op. at 14)

He determined that the agreement to sell was reached in May, 1999, and the final terms of the sale were contained in the unexecuted Agreement for Sale, which was sent from Nickels' counsel to Wild Waves on May 17, 1999. (Letter Op. at 2) The unexecuted Agreement for Sale provided that the sale was

contingent upon Wild Waves receiving a written commitment from an institutional lender to make a mortgage loan in the amount of $ 5.4 million [5] on or before three months of the date of the closing. [6] (Agreement for Sale at ¶ 4; NA:50-51) The date of the closing was set for January 31, 2003. (Id. at ¶ 5; NA:51)

After reviewing other contemporaneous communications between Nickels and Wild Waves, Judge Seltzer concluded:

> I am, therefore, satisfied, beyond any hesitation, that Nickels Midway Pier and Wild Waves had reached an agreement that would require Wild Waves to lease a portion of the Pier for a three year period and thereafter purchase it in accordance with the terms of [Agreement for Sale]. I am further certain that the lease and sale were two aspects of a thoroughly integrated agreement. Although only the portion of agreement [sic] respecting the lease was committed to an executed writing, I remain absolutely convinced that these parties intended to be bound as to the sale, even in the absence of an executed writing.

(Letter Op. at 9-10) He determined that the Lease was one component of a transaction that was to culminate in the sale of the Pier, and was entered into in part to aid Wild Waves in securing financing for the water park. (Letter Op. at 11)

After resolution of Wild Waves' counterclaim in the State Court Action, Nickels sought to proceed with its Motion to Reject in Bankruptcy Court. Although it is

not entirely clear from the record on appeal, it appears that upon an oral motion by Nickels, the Bankruptcy Court and the parties treated the renewed Motion to Reject as encompassing both the written Lease and the oral contract for sale (collectively the "Agreement"), pursuant to Judge Seltzer's ruling. (*See* Tr. Of Aug. 9, 2005, Hearing at 7:11-18; NA:72)

The Bankruptcy Court held a hearing on the Motion to Reject on August 9, 2005, and issued its opinion on September 1, 2005, and an order on September 14, 2005. Bankruptcy Judge Burns first held that the Agreement was an executory contract for the purposes of *11 U.S.C. § 365(a)*. She concluded that the Agreement had not been terminated prior to the filing of the bankruptcy petition by any anticipatory repudiation on the part of Nickels, and that Wild Waves was estopped from arguing otherwise. Bankruptcy Judge Burns noted that substantial performance under the Agreement was still outstanding by both parties.

The Bankruptcy Court next held that Nickels was permitted to reject the Agreement pursuant to *§ 365(a)*. Bankruptcy Judge Burns concluded that Nickels exercised reasonable business judgment in rejecting the Agreement, as real estate values in Wildwood had increased and Nickels had multiple offers to buy the Pier at much higher prices than in the Agreement. The Bankruptcy Court rejected Wild Waves' argument that Nickels could not reject the Agreement because Wild Waves was entitled to specific performance of the Agreement under state law. Bankruptcy Judge Burns determined that the protections granted in *§ 365(i)* to parties whose contracts for sale of real property have been rejected by a debtor preempted Wild Waves' specific

performance claim. The Bankruptcy Court also held that Wild Waves' cause of action for specific performance of the Agreement was a claim in bankruptcy under *11 U.S.C. § 101(5)* and thus could be discharged in a bankruptcy proceeding.

Finally, the Bankruptcy Court concluded that Wild Waves was entitled to the protections of *§ 365(i)* because it was a "purchaser in possession" within the meaning of that section even though it was only in possession of 70% of the Pier. Nickels appeals the Bankruptcy Court's determination and Wild Waves cross-appeals.

II.

The District Court has jurisdiction to hear appeals from final judgments, orders and decrees of the Bankruptcy Court in cases and proceedings referred pursuant to *28 U.S.C. § 157(a)* to the Bankruptcy Court. *28 U.S.C. § 158(a)*. The Bankruptcy Court exercised jurisdiction over this case pursuant to *§ 157(a)* and thus, under *§ 158(a)*, this Court has jurisdiction over the appeals of the parties from the final order of the Bankruptcy Court.

The District Court reviews de novo the legal determinations of the Bankruptcy Court. *In re Fairfield Exec. Assoc., 161 B.R. 595, 599 (Bankr. D.N.J. 1993)*. The factual determinations of the Bankruptcy Court will be left undisturbed on appeal unless they are clearly erroneous. *Fed. R. Bankr. P. 8013*.

III.

A.

The Bankruptcy Code provides that a trustee or debtor in possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." [7] *§ 365(a)*. "'[An executory contract is] a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.'" *Sharon Steel Corp. v. National Fuel Gas Dist. Corp. (In re Sharon Steel), 872 F.2d 36, 39 (3d Cir. 1989)*(quoting Vern Countryman, *Executory Contracts in Bankruptcy, Part I*, 57 Minn. L. Rev. 439, 460 (1973)).

Although the Bankruptcy Code does not specify the standard to be applied in assessing the decision of a trustee or debtor in possession to assume or reject of a contract, the Third Circuit has adopted the business judgment standard. *Sharon Steel, 872 F.2d at 39-40; see also In re Central Jersey Airport Svcs., 282 B.R. 176, 183 (Bankr. D.N.J. 2002)*. "To satisfy the test, the trustee or debtor in possession needs to establish that rejection will benefit the estate. . . . Once the debtor meets its burden, the non debtor party bears the burden of proving that the debtor's decision derives from bad faith, whim or caprice." *In re Central Jersey Airport Svcs., 282 B.R. at 183* (citations omitted).

If a bankruptcy court approves the rejection of an executory contract or unexpired lease pursuant to *§ 365(a)*, the Bankruptcy Code provides certain protections to the other party to the contract or lease. In particular, *§ 365(h)* and *§ 365(i)* provide some protection, respectively, to lessees and purchasers in possession of real property under a contract for sale.

Section 365(h) provides, in relevant part, that if the debtor in possession rejects an unexpired lease of real property under which the debtor is the lessor and the term of the lease has begun, the lessee retains its rights in or appurtenant to the property for the term of the lease and any renewal or extension period. *§ 365(h)(1)(A)(ii).* If the lessee remains in possession of the property under this provision, it is entitled to an offset against the rent for damages caused by the non-performance by the debtor of any obligations under the lease. *§ 365(h)(1)(B).*

Section 365(i) carves out a limited exception to a debtor's ability to reject a contract for the sale of real property. It creates certain protections for a purchaser already in possession of the real property whose contract for sale has been rejected by the debtor. The section provides that:

> (1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, *under which the purchaser is in possession,* such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.
>
> (2) If such purchaser remains in possession-
>
> (A) *such purchaser shall continue to make all payments due under such contract,* but may offset against such payments any damages occurring after the

> date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and
>
> (B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

§ 365(i) (emphasis added). In the instant case, the Bankruptcy Court held that this section applied.

Nickels argues that the Bankruptcy Court erred in concluding that Wild Waves was a "purchaser in possession" for the purposes of *§ 365(i)* because Wild Waves was not in possession of the entire Pier. Nickels also contends that Wild Waves' partial possession of the Pier is pursuant to the Lease and not the oral contract for sale. [8] Nickels further maintains that Wild Waves does not come within the ambit of *§ 365(i)* because the statute is intended to protect only those purchasers who have already made payments under the contract of sale.

In its cross-appeal, Wild Waves argues that the Bankruptcy Court erred in determining that the Agreement was an executory contract for the purposes of *§ 365(a)*. Wild Waves contends that Bankruptcy Judge Burns incorrectly held that it was judicially estopped from arguing that the Agreement was terminated by Nickels' anticipatory repudiation prior to the filing of the bankruptcy petition, and further that

she erred in concluding that the Agreement had not been so terminated. Wild Waves also maintains that Nickels did not exercise reasonable business judgment in rejecting the agreement pursuant to *§ 365(a)*. Finally, Wild Waves contests Judge Burns' conclusion that it was barred from seeking specific performance of the Agreement under New Jersey law, arguing that: (a) *§ 365(i)* does not preempt its state law specific performance cause of action, and (b) Wild Waves' specific performance cause of action is not a "claim" that can be discharged in a bankruptcy proceeding.

B.

In the opinion and the briefs on appeal, the parties and the Bankruptcy Court have treated the Lease and oral contract for sale as one seamless agreement, referring throughout to the Agreement. This treatment, however, overlooks that the Lease and the oral contract for sale are independent components of the parties' integrated agreement as to the disposition of the Pier. As a result of this initial misstep, the Bankruptcy Court incorrectly held that Wild Waves is entitled to the protections of *§ 365(i)*.

1.

Judge Seltzer's ruling that the parties entered into an integrated agreement encompassing both the Lease and the oral contract for sale does not preclude the conclusion that the two aspects of the agreement operate independently. [9] In fact, Judge Seltzer recognized that the Lease and the oral contract for sale were distinct and separate steps in effecting the parties' agreement as to the ownership of the Pier. He found that the parties agreed that Wild Waves would first lease a portion of the Pier in order to secure

financing and build a water park pursuant to the terms of the Lease, and then Nickels would sell Wild Waves the entire Pier pursuant to the terms contained in the unexecuted Agreement for Sale.

It is a common occurrence that a business transaction is implemented through multiple contracts. *See, e.g., In re T & H Diner, Inc., 108 B.R. 448, 450 (Bankr. D.N.J. 1989)* (debtor and creditor "executed several interrelated contracts under which the debtor sublet the property and purchased a restaurant operating on the premises"). For example, when several individuals come together to form a corporation, their relationship will be memorialized in several separate contracts, such as the articles of incorporation, shareholder agreements, and employment/consulting contracts. Here, Wild Waves and Nickels also chose to implement their overall agreement as to the disposition of the Pier through two separate, though interrelated, contracts.

The terms and operation of the two parts of the agreement between Nickels and Wild Waves illustrate their independent nature. First, regardless of whether the sale of the Pier was ever completed, the Lease gives Wild Waves a sixteen-year leasehold interest in the leased premises, with the option to renew the Lease for three five-year terms.

The effectiveness of the Lease was expressly made contingent upon Wild Waves' ability to secure the necessary financing and government approvals for the construction of the water park, and not on Wild Waves' ability to secure financing to purchase the entire Pier. The Lease also anticipates that Wild Waves may not be able to purchase the Pier, as it grants Nickels access to

the leased premises for several purposes including showing the property to prospective buyers.

The oral contract for sale was made expressly contingent on Wild Waves' receipt of a written mortgage loan commitment in the amount of $ 5.4 million. If the parties failed to close the sale, due to Wild Waves' inability to secure such a loan commitment or any other reason, the Lease would not be terminated or otherwise impacted by the failure to close. *Cf. In re T & H Diner, 108 B.R. at 450* (lease agreement provided that debtor's default on any promissory notes given by the debtor to the landlord in connection with purchase of restaurant on leased premises would be considered default under the lease). There is no indication anywhere in the Lease or the unexecuted Agreement for Sale that the failure to close would affect the Lease's sixteen-year term or the option to extend the Lease for three additional five-year terms. [10]

Additionally, the oral contract for sale was not contingent on Wild Waves' compliance with the terms of the Lease. Normally, if a lease contains an option to buy the leased property, it will also provide that a breach of the lease would terminate the option to buy. Here, however, the only contingency for the sale is the receipt of the mortgage loan commitment.

The oral contract for sale does not provide that payments made pursuant to the Lease would be counted towards the purchase of the Pier, or vice versa. When the parties executed the Amendment to Lease to require Wild Waves to pay $ 400,000 as additional collateral, they specifically provided that if Wild Waves' mortgage was paid off before the maturity date the $ 400,000 or balance remaining would be used for rental

payments as they become due, rather than crediting the amount towards the sums due under the oral contract for sale. (NA:488-89)

Furthermore, the two aspects of the parties' agreement would be considered divisible under New Jersey law. Whether a contract is entire or divisible "depends on the intentions of the parties, to be ascertained from the circumstances surrounding the agreement and the contract itself." *Studzinski v. Travelers Ins. Co., 180 N.J. Super. 416, 419, 434 A.2d 1160 (Law Div. 1981); see also Dixon v. Smyth Sales Corp., 110 N.J.L. 459, 460-61, 166 A. 103 (E. & A. 1931).*

"If there be a single assent to a whole transaction involving several things or several kinds of property, a contract is always entire; but, if there be a separate assent to each of the several things involved, it is divisible. . . . A contract is 'entire' when the promise of one party is conditional on entire performance of the contract by the other party, and 'severable' when the part to be performed by one party consists of several distinct and separate items respecting which the consideration is apportioned to each item, or is left to be implied in law." *Dixon, 110 N.J.L. at 461.*

Here, the parties entered into the Lease and the oral contract for sale on separate occasions and by different methods (executed contract and oral agreement acknowledged in subsequent writing). The Lease and the unexecuted Agreement for Sale require separate consideration from the parties for each aspect of the agreement. The obligations of the parties under the oral contract for sale are not conditioned on the faithful performance of the other party's obligations under the Lease. The promises of each party under the

Lease and oral contract for sale are thus "distinct and separate items respecting which the consideration is apportioned to each item," to which separate assent was given. *Id.; cf. In re T & H Diner, 108 B.R. at 454* (transaction not divisible when parties simultaneously executed the lease and purchase agreement and lease provided that any default on promissory note issued in connection with purchase of restaurant was also a default under the lease).

2.

The Bankruptcy Court's conflation of the Lease and the oral contract for sale is significant because, as a result, it incorrectly equated Wild Waves' possession of the leased premises under the Lease with possession under the oral contract for sale. The parties have focused on whether *§ 365(i)* requires that Wild Waves be in possession of the entire Pier or if possession of 70% of the Pier is sufficient to bring Wild Waves under the protection of *§ 365(i)* as a "purchaser in possession."[11]

The crucial inquiry, however, is not whether Wild Waves has possession of a sufficient portion of the Pier but whether it came into possession in circumstances which trigger the protection of "purchasers in possession" under *§ 365(i)*.

Viewing the Lease and the oral contract for sale as separate aspects of the agreement, it is clear that Wild Waves is in possession of the leased premises under the Lease and not the oral contract for sale. *Section 365(i)* is thus inapplicable because there is no contract for sale "under which [Wild Waves] is in possession" of any part of the Pier. *§ 365(i)(1)*.

The legislative history of *Section 365(i)* is scant, but its limited discussion of the provision reveals a concern for "obviating the hardship involved in forcing a purchaser already in possession to leave." *McCannon v. Marston, 679 F.2d 13, 18 (3d Cir. 1982)*. The Legislative History and Comment states that:

> Subsection (i) gives a purchaser of real property under a land installment sales contract similar protection [as *§ 365(h)* provides to lessees]. The purchaser, if the contract is rejected, may remain in possession or may treat the contract as terminated. If the purchaser remains in possession, he is required to continue to make the payments due, but may offset damages that occur after rejection. The trustee is required to deliver title, but is relieved of all other obligations to perform.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 349 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 60 (1978).

Although the Third Circuit and other courts have held that the application of *§ 365(i)* is not limited to land installment sale contracts, *see McCannon, 679 F.2d at 18*, the origins of the Bankruptcy Code's protection of purchasers in protection is linked to this particular form of land sale contract. "'The purchaser in this kind of contract is likely to be the buyer of a home or farm or small business who has adjusted to a new location. Very often, especially in the case of a residential buyer, he will be poor. Certainly, modern American bankruptcy policy places as high a value on relieving the poor from the consequences of their own and others' improvidence

as in doing perfect justice between creditors.'" *In re Summit Land, 13 B.R. 310, 317 (Bankr. D. Utah 1981)* (citing working paper included in the 1973 Report of the Commission on the Bankruptcy Laws of the United States); *see also In re Balco Equities Ltd., Inc., 323 B.R. 85, 97 (Bankr. S.D.N.Y. 2005).*

As the Bankruptcy Court noted in *In re Maier*, however, "to limit the type of contract to which *§ 365(i)* applies is to ignore the statutory scheme set up by Congress to protect those who deal with a debtor when the debtor is the owner of real property." *127 B.R. 325, 327 (Bankr. W.D.N.Y. 1991)* (holding that purchasers in possession under contracts other than land installment sale contracts are protected by *§ 365(i)*); *see also McCannon, 679 F.2d at 18* ("It is understandable that a committee note would single out such contracts for mention, since they are common instances in which the purchaser would come into possession before the contract is fully executed.").

It appears that *§ 365(i)* would encompass a land sale contract such as the oral contract of sale between Wild Waves and Nickels, provided the other requirements of the section were met. Despite their broad interpretation of the types of contracts for sale included within the scope of *§ 365(i)*, courts have never suggested that the provision encompasses those purchasers who are in possession under an agreement other than the land sale contract. *See McCannon, 679 F.2d at 17* ("*Section 365(i)* permits a purchaser who is in possession *under such an executory contract* that has been rejected by the trustee the choice of treating the contract as terminated or remaining in possession.") (emphasis added); *In re Summit Land, 13 B.R. at 317* ("The statutes speak of a purchaser in possession and of

a party 'whose executory contract to purchase real property from the debtor is rejected and *under which such party is not in possession.*'") (emphasis added).

This case presents the rare situation in which a party in possession of real property under a lease also has a separate (albeit related) contract for sale of the property. [12] Although Wild Waves is a contract purchaser of the Pier and is in possession of at least part of the Pier, *§ 365(i)* is not applicable because its possession is not pursuant to the contract of sale.

The Lease provides that Nickels must transfer possession of the leased premises to Wild Waves on October 1, 1999. It appears from the record that Nickels in fact transferred possession to Wild Waves on or about that date, pursuant to the Lease.

By contrast, the unexecuted Agreement for Sale makes no reference to Wild Waves taking possession or Nickels transferring possession of any portion of the Pier. Contracts for sale ordinarily include a clause outlining the transfer of possession, and it is notable that the unexecuted Agreement for Sale does not contain any such provision. Moreover, the only specific statement in the written document with regard to possession of the Pier is found in Paragraph 11(a), which provides only that Wild Waves shall have access to the premises in order to conduct inspections. (Agreement for Sale at ¶ 11(a); NA:53)

The terms contained in the unexecuted Agreement for Sale also acknowledge that Wild Waves already possessed part of the Pier, through the references to Wild Waves building and operating the water park on the leased premises. (*See* Agreement for Sale at ¶¶ 4, 9; NA:50, 52) The oral contract for sale clearly anticipates

that Wild Waves would already be in possession of the leased premises pursuant to the Lease. [13]

C.

This Court affirms the Bankruptcy Court's determination that Wild Waves' claim for specific performance of the oral contract for sale is a claim within the meaning of *11 U.S.C. § 101(5)*, and thus can be discharged in a bankruptcy proceeding. *Section 101(5)* defines a claim as, inter alia, a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. . . ." *§ 101(5)(B)*. The term "claim" should to be construed broadly. *See Ohio v. Kovacs, 469 U.S. 274, 279, 105 S. Ct. 705, 83 L. Ed. 2d 649 (1985); Air Line Pilots Ass'n v. Continental Airlines (In re Continental Airlines), 125 F.3d 120, 132 (3d Cir. 1997).*

In determining the scope of *§ 101(5)(B)*, the Supreme Court in *Kovacs* relied upon a statement by the sponsors of the Bankruptcy Reform Act:

> *Section [101(5)(B)]* . . . is intended to cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some States, a judgment for specific performance may be satisfied by an alternative right to payment in the event performance is refused; in that event, the creditor entitled to specific performance would have a 'claim' for purposes of a proceedings under title 11.

469 U.S. at 280 (quoting 124 Cong. Rec. 32393 (1978)).

Relying on this citation in *Kovacs*, the Third Circuit has held that "an equitable remedy will 'give rise to a right of payment,' and therefore be deemed a 'claim,' when the payment of monetary damages is an alternative to the equitable remedy." *In re Ben Franklin Hotel Assocs., 186 F.3d 301, 305 (3d Cir. 1999)*; *see also In re Kilpatrick, 160 B.R. 560, 564 (Bankr. E.D. Mich. 1993)* ("any right which can be reduced to monetary damages is a 'claim,' even if that right could also be enforced by means of an 'equitable remedy'") (creditor's rights under covenant not to compete held to be a claim). [14]

As the Bankruptcy Court observed, under New Jersey law specific performance is an equitable remedy that is appropriate when the legal remedy of compensation is inadequate or incalculable. *Fleischer v. James Drug Stores, 1 N.J. 138, 146-47, 62 A.2d 383 (1948)*. "There is a virtual presumption, because of the uniqueness of land and the consequent inadequacy of monetary damages, that specific performance is the buyer's appropriate remedy for the vendor's breach of the contract to convey." *Friendship Manor, Inc., v. Greiman, 244 N.J. Super. 104, 113, 581 A.2d 893 (App. Div. 1990)* (stating that specific performance is a discretionary remedy and a party seeking such remedy "must stand in conscientious relation to his adversary").

A buyer may also seek compensatory or "benefit of the bargain" damages, however, when a seller breaches an executory contract to convey real property. [15] *Donovan v. Bachstadt, 91 N.J. 434, 443-444, 453 A.2d 160 (1982)* (rejecting the English rule which limited buyer's damages to recovery of deposit unless seller

wilfully refuses to convey or has committed fraud or deceit). While noting that the elements of damages will depend on the circumstances of the particular case, the *Donovan* Court stated:

> Some items, however, will almost invariably exist. Thus the purchaser will usually be entitled to the return of the amount paid on the purchase price with interest thereon. Costs and expenses incurred in connection with the proposed acquisition, such as for the title search and survey, would fall in the same category. The traditional test is the difference between the market price of the property at the time of the breach and the contract price.

Id. at 445. Donovan further noted that "damages for breach of contract are appropriate where there has been a failure to comply with a decree for specific performance." *Id. at 437 n.1.*

Nickels' alleged breach of the oral contract of sale "gives rise to a right to payment, " *§ 101(5)(B)*, and thus, "the payment of monetary damages is an alternative to the equitable remedy." *In re Ben Franklin Hotel Assocs., 186 F.3d at 305.* As such, Wild Waves' action for breach of the oral contract for sale is a claim that can be discharged in bankruptcy. *See TKO Properties, LLC, v. Young (In re Young), 214 B.R. 905, 912 (Bankr. D. Id. 1997)* (finding that both specific performance and monetary damages were available under Idaho law for breach of contract for sale of real property and thus purchaser had claim within meaning of *§ 101(5)*); *A.J. Lane & Co., Inc., v. BSC Group (In re*

A.J. Lane & Co., Inc.), 115 B.R. 738, 742 (Bankr. D. Mass. 1990) ("A seller's obligation under a contract for the sale of real estate is consequently treated as a claim in bankruptcy where the buyer has the right to either damages or specific performance, so that the seller's obligation is allowable and dischargeable.").

The Court notes that if it were to accept Wild Waves' argument that the availability of a specific performance remedy takes an action outside the definition of a claim dischargeable in bankruptcy, it would render the rejection provisions of *§ 365* meaningless with regard to many contracts. The fact that a creditor's specific performance remedy is preferable to a damages remedy does not mean that a creditor's right to specific performance cannot be reduced to a claim in bankruptcy. *See A.J. Lane, 115 B.R. at 743* ("Congress was obviously intent that the remedy of specific performance not give the buyer more favorable treatment than he would obtain through his claim for damages.").

In light of the ruling that the Lease and the oral contract of sale must be analyzed separately in determining the applicability of *§ 365*, on remand the Bankruptcy Court must separately analyze the legal consequences of the rejection of each aspect of the parties' agreement, including the impact, if any, of Wild Waves' arrearages under the Lease. *See Stewart Title Guaranty Co. v. Old Republic National Title Ins. Co., 83 F.3d 735, 741 (5th Cir. 1996)* ("If a single contract contains separate, severable agreements the debtor may reject one agreement and not another."); *In re Cutters, Inc., 104 B.R. 886, 889 (Bankr. M.D. Tenn. 1989).* [16]

The Bankruptcy Court must also reconsider its ruling that rejection is in the best interests of the debtor's estate, and analyze separately whether rejection of the Lease or the oral contract for sale meets the standard of the business judgment rule. *See In re Central Jersey Airport Svcs., 282 B.R. at 183.* The Court notes that if Nickels decides to or is permitted to reject the Lease, this may affect the value of the Pier for the purposes of evaluating whether it is in the best interest of the estate to reject the oral contract for sale, and vice versa. [17]

Although *§ 365(i)* is inapplicable, if the Bankruptcy Court approves the rejection by Nickels of either the Lease or the oral contract for sale, it should consider whether other statutory provisions, such as *§ 365(h)*, offer protection to Wild Waves. [18]

IV.

For the reasons set forth above, this Court will reverse the Bankruptcy Court's order of September 14, 2005, determining that Wild Waves was entitled to the protections set forth in *§ 365(i)*, and remand the matter for further proceedings consistent with this Opinion. The Court will deny Wild Waves' cross-appeal. The Court will enter an appropriate order.

Dated: April 24, 2006

JOSEPH E. IRENAS, S.U.S.D.J.

ORDER GRANTING APPEAL OF NICKELS MIDWAY PIER, LLC, AND DENYING CROSS-APPEAL OF WILD WAVES, LLC, AND REMANDING THE MATTER TO THE BANKRUPTCY COURT

IRENAS, Senior District Judge:

This matter having appeared before the Court upon the appeal of Nickels Midway Pier, LLC, and the cross-appeal of Wild Waves, LLC, the Court having considered the submissions of the parties, and having heard oral argument on April 5, 2006, and for the reasons set forth in an Opinion issued by this Court on even date herewith ("the Opinion"), and for good cause appearing;

IT IS on this 24th day of April, 2006,

ORDERED THAT:

1. The appeal of Nickels Midway Pier, LLC, is hereby **GRANTED** and the September 14, 2005, Order of the Bankruptcy Court is **REVERSED** and **REMANDED** for further proceedings consistent with the Opinion.

2. The cross-appeal of Wild Waves, LLC, is hereby **DENIED.**

JOSEPH E. IRENAS, S.U.S.D.J.

Footnotes

[1]The Lease is dated May 15, 1999, but apparently was signed on March 29, 1999, in order to avoid triggering an obligation to pay a commission to a real estate broker.

[2]Hereinafter the Court will refer to the Appendix submitted by Nickels as "NA" and the Appendix of Wild Waves as "WWA."

[3]The subject matter of the suit is not entirely clear from the record, but it appears that Nickels was seeking possession of the leased premises for non-payment of rent.

[4]The unexecuted Agreement for Sale also provided that Wild Waves would remit a $ 10,000 deposit upon execution of the Agreement for Sale. (Agreement for Sale at ¶ 3(a); NA:49) Wild Waves indicated during oral argument that it did not think it was obligated to make this payment because the Agreement for Sale was never executed, and thus did not remit the deposit.

[5]The Agreement for Sale further specifies that the "mortgage shall include sufficient funds for the payment of the existing indebtedness Borrower has incurred for the building of the water park contemplated in the Business Lease between the parties hereto dated May 15, 1999." (Agreement for Sale at ¶ 4; NA:50)

[6]If Wild Waves was unable to secure the mortgage loan commitment within that time, both Nickels and Wild Waves had the right to cancel the Agreement for Sale upon written notice. (Agreement for Sale at ¶ 4; NA:51)
[7]The Bankruptcy Code includes several exceptions to the power of a trustee or debtor in possession to reject or assume a contract under *§ 365(a). See, e.g., § 365(b)-(d)*. The parties do not assert that any of these exceptions are applicable here.

[8]Wild Waves' contention that Nickels did not present this argument to the Bankruptcy Court, and thus has waived it on appeal, is without merit. Nickels' brief in support of the Motion to Reject argues that "Wild

Waves [sic] possession of a portion of the Property is pursuant to the terms of a Lease and is not based upon the oral contract for sale. . . . Wild Waves cannot transform its partial inhabitance of the Property under a separate lease agreement into what amounts to 'possession' under Code *Section 365(i)* and *(j)*." (WWA: 341-42)

[9]Judge Seltzer did not refer to the contract as "integrated" in the traditional legal sense, that is, he clearly did not hold that the parties' entire agreement was found within the four corners of a written document. Rather, he described the agreement as integrated to emphasize the interrelation of its component parts.

[10]The Court notes that if the parties closed the sale of the Pier, Wild Waves' leasehold interest would merge into its fee interest in the property and disappear.

[11]The Court notes that in the appropriate case, the issue of whether partial occupancy is sufficient to trigger *§ 365(i)* could be determinative.

[12]*In re Maier* presents a more typical case in which a creditor gains possession under the same contract giving him the right to purchase the property. There, the creditor leased a farm from the debtor, and his lease included in its terms an option to buy the property. *127 B.R. at 326.* Upon exercise of the option, it appeared that the lease would terminate and become a contract for the purchase of real estate. The Bankruptcy Court concluded that if the creditor properly exercised his option to purchase the farm prior to bankruptcy, the creditor would become a purchaser in possession under

New York law and thus would be entitled to the protections of *§ 365(i)*. *Id. at 327-28.*

[13]In their briefs and before this Court, the parties discussed the applicability of the requirement contained in *§ 365(i)(2)(A)* that the purchaser in possession "shall continue to make" payments due under the contract for sale, in light of Wild Waves' failure to make the $ 10,000 initial payment called for in the unexecuted Agreement for Sale. Given our holding that Wild Waves' may not claim the protection of *§ 365(i)* because it is not a purchaser in possession for the purposes of the statute, we need not address the parties' arguments with regard to the "shall continue" requirement.

[14]Courts have varied in the standard they apply to determine whether monetary damages are an alternative to equitable relief. *See In re Ben Franklin Hotel Assocs., 186 F.3d at 306* (stating the relevant inquiry is whether monetary damages are a "viable alternative"); *Sheerin v. Davis (In re Davis), 3 F.3d 113, 116 (5th Cir. 1993)* ("suboptimal" monetary damages are not an alternative); *In re Kilpatrick, 160 B.R. at 566* (creditor must demonstrate that specific performance is its only viable remedy); *In re Indian River Estates, Inc., 293 B.R. 429, 434 (Bankr. N.D. Ohio 2003)* (creditor not required to accept monetary remedy if it would be "clearly not in proportion to the equitable remedy"). The text of *§ 101(5)*, as well as the legislative history, however, do not incorporate any notion of the adequacy of the alternative monetary remedy.

[15]The Court notes that Wild Waves provided a detailed and specific calculation of the damages it would incur if

the parties' agreement was rejected in its brief before the Bankruptcy Court. (WWA:255-58)

[16]Wild Waves argues that Nickels anticipatorily breached the oral contract for sale, and thus the contract was no longer executory and could not be rejected pursuant to *§ 365*. Neither party has performed any of their obligations under the oral contract for sale, and so the contract is clearly executory. *See Sharon Steel, 872 F.2d at 39*. Wild Waves incorrectly equates the anticipatory repudiation of a contract with termination or cancellation of a contract. Anticipatory repudiation is a statement in advance of the time for performance that a party will breach its obligation to perform under a contract. 23 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 63:28 (4th ed. 1994) ("Otherwise stated, an anticipatory repudiation is a breach of contract."). A prepetition breach of a contract does not render the contract non-executory. *In re W & L Assocs., Inc., 71 B.R. 962, 965 (Bankr. E.D. Pa. 1987).*

[17]We need not address two issues raised in Wild Waves' cross-appeal, namely, that the Bankruptcy Court erred in relying on the two letter offers in determining the value of the Pier and in holding that an increase in property value alone is sufficient to satisfy the business judgment rule, in light of today's ruling. To the extent that the valuation of the Pier will be relevant to the Bankruptcy Court's analysis on remand, this Court is concerned that the evidence admitted in the prior proceedings may not be enough to determine the property's value. Ordinarily, property values will be determined with the aid of expert evaluation or, at minimum, firm offers to purchase the property. *See In*

re Central Jersey Airport Svcs., 282 B.R. at 183 (business judgment standard met for rejection of contract for sale where appraisal of debtor's property indicated that value had appreciated by $ 2 million).

[18]The Bankruptcy Court observed that if Wild Waves was not in possession of the property under the contract for sale, *§ 365(j)* may be applicable. Judge Burns correctly noted that this section would entitle Wild Waves only to a lien in the amount of any payments it had made toward the purchase price. Given that Wild Waves has made no payments toward the purchase price of the Pier, this section would offer it no relief. *See In re Waldron, 36 B.R. 633, 641 (Bankr. S.D. Fla. 1984).*

FILED November 2, 2005

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

CHAPTER 11 CASE NO. 0349462 (GMB)

IN RE: NICKELS MIDWAY PIER, LLC, DEBTOR.

ORDER DENYING MOTION TO RECONSIDER

The relief set forth on the following page, numbered two (2) is hereby ORDERED:

Upon consideration of the Motion (the "Motion") of Nickels Midway Pier. LLC ("Debtor") to reconsider the Court's Order Granting, In Part, Debtor's Motion to Reject Executory Contract; and the response of Wild Waves, LLC ("Wild Waves"); it is hereby ORDERED:

1. That the Motion is DENIED.

GLORIA M. BURNS
United States Bankruptcy Judge

FILED September 14, 2005

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

CHAPTER 11 CASE NO. 0349462 (GMB)

IN RE: NICKELS MIDWAY PIER, LLC, DEBTOR.

ORDER GRANTING, IN PART, DEBTOR'S MOTION TO REJECT EXECUTORY CONTRACT

The relief set forth on the following page, numbered two (2) is hereby ORDERED:

Upon consideration of the Motion (the "Motion") of Nickels Midway Pier, LLC ("Debtor") to reject the executory contract and its supporting pleadings; the response of Wild Waves, LLC ("Wild Waves"), and its supporting pleadings; the Court having conducted an evidentiary hearing on August 9, 2005; and the Court's Memorandum Opinion[1] filed on September 1, 2005; it is hereby ORDERED:

1. That the Motion is GRANTED, in part.

2. That Debtor is authorized to, and by this Order is deemed to have rejected the executory contract between it and Wild Waves.

3. That Wild Waves is in possession of the Pier, and thereby entitled to the protections set forth in 11 U.S.C. § 365(i).

[1]Unless otherwise defined herein, all capitalized terms

shall have the same meanings ascribed to them in the Memorandum Opinion.

GLORIA M. BURNS
United States Bankruptcy Judge

FILED September 1, 2005

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

CHAPTER 11 CASE NO. 0349462 (GMB)

IN RE: NICKELS MIDWAY PIER, LLC, DEBTOR.

MEMORANDUM OPINION

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Before the Court is Debtor, Nickels Midway Pier, LLC's ("Nickels"), motion to reject executory contract, pursuant to 11 U.S.C. § 365. A hearing on this matter was held on August 9, 2005.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(a), and the Standing Order of the United States District Court for the District of New Jersey dated July 23, 1984, referring all bankruptcy cases to the bankruptcy court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Venue of this case is proper in the District of New Jersey pursuant to 28 U.S.C. §§ 1408 and 1409. The following shall constitute findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

I. FACTUAL BACKGROUND

Nickels Midway Pier, LLC is in the business of purchasing, leasing and managing real estate. Nickels owns two pieces of property in Wildwood, New Jersey. At issue in this case is a pier (the "Pier") located at 3500 Boardwalk, Wildwood, New Jersey. Nickels purchased the Pier in November of 1976. In 1999, Nickels and Wild Waves, LLC ("Wild Waves") entered into a written lease agreement, whereby Wild Waves would lease 70 percent of the Pier for the purpose of constructing and operating a water park. Wild Waves asserted that the written lease was part of an agreement to sell the pier. Wild Waves constructed new concrete foundations and made other improvements to the property for the purpose of

constructing a water park. Wild Waves has been operating its water park on the Pier since 2000. On the remaining 30 percent of the Pier are located several buildings and kiosks leased to a variety of tenants on the boardwalk.

The parties disagreed on the issue of whether Nickels had agreed to sell the Pier to Wild Waves. Wild Waves asserted that Nickels agreed orally to sell it the Pier, while Nickels argued that it never entered into an agreement to sell the Pier and that Wild Waves merely held a leasehold interest in the portion of the Pier occupied by the water park. Neither party completed performance of the alleged sale contract; i.e., Wild Waves did not furnish a deposit or the purchase price, and Nickels did not deliver the deed.

In 2001, Nickels initiated a civil action in the New Jersey Superior Court, Chancery Division and Wild Waves filed counterclaims prior to the filing of the bankruptcy. Wild Waves' counterclaim sought a determination that an oral contract for the sale of the Pier existed between the parties. A trial in that matter commenced on December 3, 2003.

On December 8, 2003, Nickels filed for chapter 11 bankruptcy and on December 16, 2003, Nickels filed a motion to reject its lease with Wild Waves, pursuant to 11 U.S.C. § 365. Subsequently, Wild Waves filed a motion for stay relief for the purpose of pursuing its counterclaim in the Chancery Division. On February 20, 2004, the Court granted Wild Waves' motion for stay relief and reserved its decision on whether Nickels could reject Wild Waves' lease until resolution of the state court litigation.

The parties tried their state court litigation before Judge Seltzer in the Chancery Division on December 3 and 4, 2004; February 7, 8, and 9, 2005, and on March 1, 2005. On April 25, 2005, Judge Selzter entered an order declaring that

> Nickels Midway Pier, LLC and Wild Waves, LLC entered into a binding Agreement respecting Nickels Midway Pier, pursuant to which Wild Waves was to lease a portion of the Pier pursuant to a Business Lease dated May 15, 1999 and then to purchase the entire Pier in accordance with the terms contained in a written (but unexecuted) Agreement of Sale accepted into evidence as D-21.

Judge Seltzer determined the purchase price of the Pier in 2003 to be $5,500,000.00. Currently, Nickels has received offers to purchase the Pier for $15,000,000.00 and $15,400,000.00, which included various conditions.

Upon resolution of the state court litigation, on July 25, 2005, the debtor sought to proceed with its motion to reject the executory contract filed December 16, 2003. Wild Waves filed an objection to Nickels' motion to reject and Nickels filed a response thereto on August 1, 2005. On July 28, 2005, the Court held a pre-trial conference with the parties, at which it determined that it would consider the following issues at the August 9, 2005 hearing: (1) whether the Agreement of Sale (the "Agreement") was an executory contract; (2) if so, whether Nickels satisfied the business judgment test when it decided to reject the Agreement; and (3) if Nickels may reject the Agreement, whether Wild Waves is "in possession" of the Pier under § 365(i). A

plenary hearing was held in this matter on August 9, 2005, at which time the Court directed the parties to submit post-trial briefs by August 11, 2005. The parties asserted the following arguments in support of their respective positions.

A. Nickels' Arguments

First, Nickels argues that Wild Waves is judicially estopped from asserting that the Agreement was terminated pre-petition, and therefore nonexecutory. Second, Nickels argues that the Agreement is executory, because substantial performance remains due by both parties. Specifically, Nickels argues any performance rendered by Wild Waves was performed in accordance with its obligations under the lease. Third, Nickels argues that rejection is required in order for Nickels to exercise its best business judgment, because it may obtain a significantly higher sale price from a third party, and because Wild Waves' damage calculations are inaccurate. Finally, Nickels argues that Wild Waves is not a purchaser "in possession" under § 356(i), and thus, is not entitled to the protections set forth in that section. Specifically, Nickels argues that Wild Waves occupies only 70 percent of the Pier, and that it has no connection with the remaining, more valuable 30 percent of the Pier. Nickels also argues that the fact that the water park may be dismantled and moved speaks against permanence and possession.

B. Wild Waves' Arguments

First, Wild Waves argues that the Agreement is not executory, because (a) the Agreement was terminated pre-petition as a result of Nickels' anticipatory

repudiation thereof, and (b) Wild Waves' substantial performance of the Agreement renders its nonexecutory.

Second, Wild Waves argues that Nickels' decision to reject the Agreement was not made in sound business judgment, because (a) Wild Waves' damages are likely to absorb any profit Nickels may realize from a sale to another party; (b) the other offers to purchase the Pier are not a "sure thing," and are subject to several contingencies that potentially may not occur, whereas Wild Waves is prepared to close in the near future; and (c) a sale to Wild Waves would result in a 39.14 percent distribution to creditors, while a sale to a third party would only result in a 37.66 percent distribution to creditors.

Third, Wild Waves argues that Nickels is not entitled to reject the Agreement, because Wild Waves is entitled to specific performance of the Agreement. As such, Wild Waves holds an equitable remedy that does not give rise to a payment, and as such, is not a claim as defined by § 101(5).

Fourth, Wild Waves argues that if the Court determines that Nickels is entitled to reject the Agreement under § 365(a), Wild Waves is entitled to the benefits set forth in § 365(i), because it is a purchaser "in possession."

II. DISCUSSION

A. The Agreement is Executory

The term "executory contract" is not defined in the

Code. *In re R.M. Cordova Intl Inc.*, 77 B.R. 441, 445 (Bankr. D.N.J. 1987) (Tuohey, J.). The Third Circuit has adopted the following definition expounded by Vern Countryman:

> [An executory contract] is a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.

Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp., 872 F.2d 36 (3d Cir. 1989) (quoting Countryman, Executory Contracts in Bankruptcy, Part I, 57 Minn. L. Rev. 439, 460 (1973)). The appropriate time for determining whether a contract is executory is the date of filing. *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 510 (Bankr. D. Del. 2003). In the context of land sale contracts, a contract is executory where the buyer has not furnished the purchase price and where seller has not transferred title to the buyer. *McCannon v. Marston*, 679 F.2d 13, 18 (3d Cir. 1982).

In the case sub judice, Nickels argues that (a) Wild Waves is barred by the doctrine of judicial estoppel from asserting that the Agreement is terminated, and (b) the Agreement is executory, because substantial performance is required by both parties. Conversely, Wild Waves argues that the Agreement is not executory, because (a) it was terminated pre-petition as a result of Nickels' anticipatory repudiation thereof, and (b) Wild Waves substantial performance of the Agreement renders it nonexecutory. The Court will

address each argument in turn.

1. The Agreement was not Terminated Pre-petition

It is well established that an executory contract or lease that has been validly terminated pre-petition is "not resurrected by the filing of the petition in bankruptcy, and cannot therefore be included amount the debtor's assets." *In re Triangle Laboratories, Inc.*, 663 F.2d 463, 467-68 (3d Cir. 1981). Thus, Wild Waves argues that Nickels' anticipatory breach of the Agreement pre-petition rendered it nonexecutory. For the reasons set forth below, the Court finds that (a) Wild Waves is barred by the doctrine of judicial estoppel from asserting that Agreement was terminated pre-petition, and (b) regardless, the Agreement was not terminated pre-petition.

a. Judicial Estoppel

The doctrine of judicial estoppel precludes a party "from assuming a position in a legal proceeding inconsistent with one previously asserted." *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988). A court should impose judicial estoppel only if

> (1) the party to be estopped is asserting a position that is irreconcilably inconsistent with one he or she asserted in a prior proceeding; (2) the party changed his or her position in bad faith, i.e., in a culpable manner threatening to the court's authority or integrity; and (3) the use of judicial estoppel is tailored to address the

affront to the court's authority or integrity.

Montrose Med. Group Participating Sav. Plan v. Buyer, 243 F.3d 773, 777-78 (3d Cir. 2001). "Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and those poses little threat to judicial integrity." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001); accord *Montrose Med. Group*, 243 F.3d at 778 (holding that "a party has not displayed bad faith for judicial estoppel purposes if the initial claim was never accepted or adopted by a court or agency").

In this case, Wild Waves successfully argued before the Chancery Division that a valid, binding agreement of sale was entered into by the parties. Wild Waves also argues before this Court that it is entitled to specific performance of the Agreement. At the same time, however, Wild Waves argues that the Agreement is nonexecutory because it was terminated pre-petition. The positions Wild Waves has asserted before the Chancery Division and before this Court are inconsistent, circuitous, and seemingly designed to achieve an unfair advantage in this litigation.[1] The Court finds Wild Waves' switch in positions from those asserted in state court to violate the doctrine of judicial estoppel. Furthermore, if Wild Waves were not barred by judicial estoppel, for the reasons set forth below, the Court finds that the Agreement otherwise was not terminated prior to Nickels' filing.

b. Anticipatory Breach/Repudiation

To demonstrate a cause of action for anticipatory breach under New Jersey law,[2] the moving party must

provide evidence of "a definite and unconditional declaration by a party to an executory contract through word or conduct-that he will not or cannot render the agreed upon performance." *Ross Systems v. Linden Dari-Delite, Inc.*, 35 N.J. 329, 340-41; 173 A.2d 258, 264 (N.J. 1961); *see also, Universal Computers (Systems), Ltd. v. Universal Computers (Holdings), Ltd.*, 653 F. Supp. 518, 525 (D. N.J. 1987) (citing RESTATEMENT (SECOND) of CONTRACTS § 250 (1981)). An anticipatory breach allows a non-breaching movant to treat a contract as terminated and to refuse to render continued performance thereunder. *Ross Systems*, 35 N.J. at 341; 173 A.2d at 265.

In this case, Nickels has held fast to its position that it never entered into a binding contract of sale with Wild Waves, relying in part on the fact that it never signed a contract of sale. Wild Waves argues that Nickels' statements and actions prior to that determination constituted an anticipatory repudiation, thereby terminating the Agreement. Wild Waves ignores the fact that a cause of action for the breach of a contract necessarily requires the existence and acknowledgment of a binding contract. On April 25, 2005, the Chancery Division entered an order finding that the parties entered into a binding oral agreement of sale. Any statements or actions undertaken by Nickels' up until the Chancery Division rendered its decision cannot be construed as an anticipatory repudiation or breach, because it was Nickel's position that no such contract existed. In other words, Nickels could not anticipatorily breach a contract before there was a determination as to its existence. Essentially, Wild Waves is requesting that the Court retroactively apply the principles of anticipatory breach, when the very nature of a cause of

action for anticipatory repudiation requires intent to commit a breach in the future. No such intent is present in this case. Therefore, based on the foregoing, the Court finds that Nickels did not anticipatorily breach the Agreement. Accordingly, the Agreement was not terminated pre-petition.[3]

2. The Agreement is Executory Because Substantial Performance Remains Outstanding on Both Sides

Having found that the Agreement was not terminated pre-petition, the Court now turns to the issue of whether the Agreement is executory. As noted above, a contract for the sale of land is executory if the buyer has not furnished the purchase price and the seller has not transferred the title. *McCannon v. Marston*, 679 F.2d at 18. In this case, Wild Waves has not delivered the required deposit, nor furnished the purchase price, and Nickels has not delivered the deed. As such, substantial performance remains outstanding on both sides of the contract. Accordingly, the Court finds that the Agreement is executory for the purposes of § 365. Courts have found land sale contracts executory in cases where significantly more performance was rendered by one of the parties. *See, e.g. In re Dunes Casino Hotel*, 63 B.R. 939, 943, 949 (D.N.J. 1986) (affirming bankruptcy court finding that the contract was executory where seller delivered deeds and requested balance of purchase price and buyer refused to remit purchaser price). Finally, the Court finds Wild Waves' argument that it substantially performed under the Agreement by constructing the water park to be unpersuasive because (1) the construction of the water park was not a condition of that contract; and (2) the

purchase price has not been furnished and the deed has not been delivered. Therefore, the contract of sale remains executory.

B. Business Judgment Rule

Pursuant to § 365 of the Code, subject to the bankruptcy court's approval, a trustee may "assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a) (2004). Section 365(a) does not supply a standard for determining when an executory contract has been properly rejected. *In the Matter of Federated Dep't Stores, Inc.*, 131 B.R. 808, 811 (S.D. Ohio 1991). Courts generally apply a business judgment standard when determining whether to authorize the rejection of an executory contract. *Id.*[4] Paramount to this determination is whether the rejection is in the best interests of a debtor's estate. *See In re Food Barn Stores, Inc.*, 107 F.3d 558, 567, n.16 (8th Cir. 1997). This is not a "strict standard," but "merely requires a showing that 'rejection would benefit the estate.'" *In re Patterson*, 119 B.R. 59, 60 (E.D. Pa. 1990) (quoting *In re Bildisco*, 682 F.2d 72, 79 (3d Cir. 1982)); *see also Sharon Steel Corp. v. Nat'l Fuel Gas Distribution Corp.*, 872 F.2d 36, 40 (3d Cir. 1989) (noting that "[w]here the rejection of an executory contract would benefit the estate, rejection is appropriate"). In determining whether rejection is in the best interests of the estate, "[t]he burden or hardship which rejection would impose on other parties to such a contract is not a factor to be weighed by the bankruptcy court in ruling upon the debtor's application." *Federated Dep't Stores, Inc.*, 131 B.R. at 811. A bankruptcy court

> should defer to a debtor's decision that rejection of a contract would be advantageous unless the decision is so unreasonable that it could not be based on sound business judgment, but only on bad faith or whim.

In re Balco Equities Ltd., Inc., 2005 Bankr. LEXIS 532, * 34 (Bankr. S.D.N.Y. 2005)(quotations omitted).

In the case at bar, Steven Nickels testified that he has received two offers to purchase the Pier for $15,000,000.00 and $15,400,000.00, respectively. The Agreement carries a purchase price of $5,500,000.00. Nickels' decision to reject the Agreement is based in part on these significantly higher offers. Wild Waves argues that Nickels' decision to reject was not made in sound business judgment, because (a) Wild Waves' damages are likely to absorb any profit Nickels may realize from a sale to another party; (b) the other offers to purchase the Pier are not a "sure thing," and are subject to several contingencies that potentially may not occur, whereas Wild Waves is prepared to close in the near future; and (c) a sale to Wild Waves would result in a 39.14 percent distribution to creditors, while a sale to a third party would only result in a 37.66 percent distribution to creditors.

While Wild Waves concerns may be valid, they are speculative. No determination has been made on what damages Wild Waves may be entitled to if the Court allows Nickels to reject the Agreement. Wild Waves' calculation of a distribution figure without determination of claims is speculation. The fact that an accountant has estimated distribution figures in this case is unpersuasive because the tax implications have

not yet been determined, the status of the insurance recoveries is in dispute and the amount of Wild Waves' rejection claim has not been quantified by resolution or judicial determination. Wild Waves' speculative distribution calculations are not sufficient to support a finding that the debtor's decision is so unreasonable that it could not be based on sound business judgment.

The Court is disinclined to find that Nickels' decision to reject the Agreement was made in bad faith or upon a whim based on speculations and contingencies. It is not necessary that the debtor's proposal is 100 percent guaranteed, but that it is reasonable. *See In Re Balco Equities, Ltd.*, 323 B.R. 85, 99 (Bankr. S.D.N.Y 2005) (holding Trustee's rejection of contract and proposed sale to third party was reasonable because third party offer was substantially higher and would benefit the estate); *In Re Prime Motor Inns*, 124 B.R. 378, 379 (Bankr. D. Fla. 1991) (evidence that a new contract may not generate more profits and might actually cause a decline in value was not enough to counteract the broad application of business judgment standard); *Cf. In Re Huff*, 81 B.R. 531, 538 (Bankr. D. Minn. 1988) (debtors failed business judgment because could not demonstrate any other more profitable offer and the prospect of an alternate lease was speculative). The fact that the debtor has multiple offers to buy the property coupled with the increase in Wildwood real estate values is sufficient to find that Nickels exercised reasonable business judgment in rejecting the Agreement. Therefore, Nickels' decision to reject the Agreement satisfies the modest requirements of the business judgment standard.

C. Rejection Pursuant to § 365(a)

Pursuant to § 365(a), subject to the bankruptcy court's approval, a trustee or debtor-inpossession "may assume or reject an executory contract or unexpired lease . . . ." 11 U.S.C. § 365(a) (2005). Wild Waves argues that Nickels' cannot reject the Agreement because it is entitled to specific performance under state law. In support of this contention, Wild Waves argues that its specific performance claim, as an equitable remedy, is not a claim under § 101(5) of the Code. Alternatively, Wild Waves argues that it is entitled to the protections provided in § 365(i) because it is a purchaser "in possession." In response, Nickels argues that federal bankruptcy law should preempt Wild Waves' state law remedies, and that Wild Waves is not "in possession," because it occupies only 70 percent of the Pier.

1. Specific Performance and Federal Preemption

a. Specific Performance

Under New Jersey law, specific performance is an equitable remedy that is appropriate when legal damages are insufficient, or when a court cannot reasonably ascertain the amount of damages. *In re Envtl. Ins. Declaratory Judgment Actions*, 149 N.J. 278, 295-96; 693 A.2d 844, 851-52 (N.J. 1997). "There is a virtual presumption, because of the uniqueness of land and the consequent inadequacy of monetary damages, that specific performance is the buyer's appropriate remedy for the vendor's breach of the contract to convey." *Friendship Manor, Inc.*, 244 N.J. Super. 104, 113; 581 A.2d 893, 897 (N.J. Super. App. Div. 1990). "Nevertheless, it is also clear that specific performance is a discretionary remedy resting on equitable principles and requiring the court to appraise the

respective conduct and situation of the parties." *Id.* at 244 N.J. Super. at 113; 581 A.2d at 898.

Wild Waves asserts that it is entitled to specific performance of the Agreement and a remedy for Nickels' alleged and as of yet undetermined breach of the Agreement. Wild Waves argues that "if a court determines that Wild Waves is entitled to specific performance, there will have necessarily been a determination that there is no adequate monetary remedy." Wild Waves' Brief at 9.[5] For the reasons set forth below, the Court finds that the Bankruptcy Code preempts Wild Waves' claim for specific performance.

b. Federal Preemption

Under the doctrine of preemption, "state laws that interfere with or are contrary to federal law are preempted and without effect pursuant to the Supremacy Clause of the United States Constitution." *In re Loranger Mfg. Corp.*, 324 B.R. 575, 582 (Bankr. W.D. Pa. 2005). Although preemption is governed by the Supremacy Clause, "it is fundamentally a question of Congressional intent in which the presumption is that Congress did not intend to displace state law." *In re Miles*, 294 B.R. 756, 759 (B.A.P. 9th Cir. 2003). "[E]stablishing that federal law overlaps state law is, by itself, insufficient to establish that federal law preempts state law." *Green v. Fund Asset Management, LP.*, 245 F.3d 214, 218 (3d Cir. 2001).

Federal law preempts state law in three situations: "(1) express preemption, (2) field preemption (which is also sometimes referred to as implied preemption), or (3) conflict preemption." *Id.* at 222. Express preemption is

appropriate "when there is an explicit statutory command that state law be displaced." *Id.* Field preemption is appropriate when federal law "so thoroughly occupies a legislative field as to make reasonable the inference that Congress [left] no room for the States to supplement it." *In re Forman Enters., Inc.*, 281 B.R. 600, 607 (Bankr. W.D. Pa. 2002). Congressional intent

> may be inferred from a scheme of federal regulation that is so comprehensive, or where the federal interest so dominates, that the federal system may be assumed to preclude enforcement of state laws on the same subject. When a federal scheme is sufficiently comprehensive to warrant an inference that Congress `left no room' for state regulation, the `field' has been preempted.

Miles, 294 B.R. at 759. Finally, conflict preemption is appropriate if a state law conflicts with a federal law such that "(1) it is impossible to comply with both state law and federal law; or (2) the state law `stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Forman Enters.*, 281 B.R. at 607 (quoting *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 382 (3d Cir. 1999)).

Section § 365(d)(2) provides that a trustee or debtor-in-possession

> may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court,

> on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

11 U.S.C. § 365(d)(2) (2005). If a trustee or debtor-in-possession rejects an executory contract for the sale of real property "under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest." 11 U.S.C. § 365(1)(1) (2005). A purchaser must be in possession of the property on the date of bankruptcy. *In re Young*, 214 B.R. 905, 911 (Bankr. D. Idaho 1997). If the purchaser remains in possession, it must

> continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset.

Id. at § 365(i)(2)(A). When the purchaser completes the contract payments, the trustee or debtor-in-possession must "deliver title to the purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract." *Id.* at § 365(i)(2)(B); *In re Pogue*, 130 B.R. 297 (Bankr. E.D. Mo. 1990).

Neither the Code, nor the legislative history attendant

to § 365(a) explicitly command that the Code section preempts a party's state law remedies. Thus, express preemption is inappropriate in this case. However, a question remains as to whether implied or conflict preemption are appropriate. For the reasons set forth below, the Court finds that § 365(i) preempts Wild Waves' claim for specific performance.

First, preemption can be reasonably inferred by the comprehensive nature of the Code. More specifically, as the Ninth Circuit Court of Appeals noted in *MRS Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910 (9th Cir. 1996), the

> complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code ... demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike.

MRS Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910, 915 (9th Cir. 1996). The court further noted that

> [w]hile it is true that bankruptcy law makes reference to state law at many points, the adjustment of rights and duties within the bankruptcy process itself is uniquely and exclusively federal. It is very unlikely that Congress intended to permit the superimposition of state remedies on the many activities that might be undertaken in the management of the bankruptcy process.

Id.

Second, the purpose of § 365(i)(2)(B) is to preserve a "purchaser's right to specific performance on an executory contract for sale of real estate." *In re Delaney*, 2003 Bankr. LEXIS 1765, *16 (Bankr. D. Mass. 2003). In other words, the protections set forth in § 365(i)(2)(B) are in place to compensate a purchaser for its lost right to specific performance by way of § 365(a). It is reasonable to infer that Congress did not intend to allow debtors to reject real estate sale contracts under § 365(a) only to have the purchasers turn around and enforce the Agreement it just rejected. Further, the comprehensive framework Congress set forth in § 365(i) to address rejected real estate sale contracts speaks to preemption. *See In re Hechinger Investment Co. of Del.*, 274 B.R. 71, 97 (Bankr. D. Del. 2002) (finding that § 546(e) preempted state remedies because "the Code comprehensively addresses such claims").

Third, disallowing Nickels' opportunity to reject the Agreement because Wild Waves has a claim for specific performance would be tantamount to allowing Wild Waves to circumvent Nickels' right to reject under § 365(a), and would obviate the need for and frustrate the purpose of § 365(1). As noted by the Fourth Circuit Court of Appeals in *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985), "allowing specific performance would obviously undercut the core purpose of rejection under § 365(a), and that consequence cannot therefore be read into congressional intent." *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985).[6]

Finally, other courts have held that specific Code

provisions preempted a party's state law claims or remedies. *See, e.g. In re Loranger Mfg. Corp.*, 324 B.R. 575, 583 (Bankr. W.D. Pa. 2005) (finding that plaintiff's claim for unjust enrichment was preempted by § 546(e)); *In re Abramson*, 313 B.R. 195, 197 (Bankr. W.D. Pa. 2004) (finding that the Code preempts state law claims that are based upon allegations that a Code provision has been violated); *Pacific Gas and Electric Co. v. People of the State of Cal.*, 350 F.3d 932, 937 (9th Cir. 2003) (finding that a chapter 11 plan of reorganization "expressly preempts otherwise applicable nonbankruptcy laws"); *Miles*, 294 B.R. at 761 (finding that complaints arising out of actions undertaken in connection with preparing a petition are preempted by the Code; *Hechinger Investment*, 274 B.R. at 96-97 (finding that § 546(e) preempts unjust enrichment claim); *Eastern Equipment and Services Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 121 (2d Cir. 2001) (finding that the Code preempted state law tort claims arising from § 362 stay violations); *In re Reyes*, 238 B.R. 507, 522 (Bankr. D.R.I. 1999) (finding that § 524 preempts state law remedies); *Summit Investment and Development Corp. v. Leroux*, 69 F. 3d 608, 609 (1st Cir. 1995) (affirming bankruptcy court decision that § 365(e) preempted certain provisions of the parties partnership agreement).

Therefore, based on the foregoing, the Court finds that § 365(1) preempts Wild Waves' state law remedy of specific performance.

c. Wild Waves' Claim Argument

Wild Waves also argues its cause of action for specific performance is not a "claim" within the meaning of §

101(5), and thus, cannot be discharged by Nickels. Conversely, Nickels argues that (1) specific performance is not the exclusive remedy for the breach of a real estate sale contract and (2) regardless, a claim for specific performance is a claim within the meaning of § 101(5).

In relevant part, § 101(5) defines a "claim" as a

> right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5)(B) (2005).

An equitable remedy can be a claim in bankruptcy under § 101(5) provided that it can be reduced to monetary damages. Claims are to be interpreted broadly in order to allow debtors to meet legal obligations and also to allow claim holders to participate in the bankruptcy proceeding. *Air Line Pilots Assn v. Continental Airlines*, 125 F.3d 120, 132 (3d Cir. 1997). An equitable right that "gives rise to a right of payment can be a claim." *Id.* An equitable right that can be reduced to monetary damages is a claim. In *re Kilpatrick*, 160 B.R. 560, 564 (Bankr. D. Mich. 1993). *See Ohio v. Kovacs*, 469 U.S. 274, 283 (1985) (injunction transformed into an obligation to pay money was a "claim").

The language of § 101(5)(B) states that a remedy for breach of performance can be a claim if that breach

gives rise to a right of payment. Wild Waves can have a claim under the plain meaning of § 101(5)(B). In general, there are alternate remedies for breach of contract. The traditional remedy at law for breach of contract, expectation damages, is always available. In the alternative, in some cases, the non-breaching party may be entitled to equitable relief such as specific performance. Specific performance is available in instances where the remedy at law fails to do justice to the parties. *Fleischer v. James Drug Stores, Inc.*, 1 N.J. 138, 146 (N.J. 1948)(citing Pomeroy's Equity Jurisprudence (5th ed. 1941) § 1401)). As set forth above, § 365(i) and (j) protect Wild Waves' right to specific performance of a contract and preempts state law to that extent.

Therefore, the Court rejects Wild Waves' argument that its rights for breach of contract is not a "claim" within the meaning of § 101(5)(B) and cannot be discharged in a bankruptcy proceeding.

D. Purchaser "In Possession"

Having determined that the Agreement is executory and may be rejected by Nickels pursuant to § 365(a), the Court must determine whether Wild Waves is entitled to the protections set forth in § 365(i). To make such a determination, the Court must first examine whether Wild Waves is "in possession" of the Pier pursuant to § 365(i). The Chancery Division determined that Wild Waves held a lease for 70 percent of the Pier, but that it was contracted to purchase the entire Pier under an oral agreement of sale. It cannot be disputed that Wild Waves is "in possession" of 70 percent of the Pier, but an issue has arisen as to whether Wild Waves

is considered "in possession" under § 365(i) when the debtor still maintains some control over 30 percent of the pier .[7]

The term "possession" is not defined in the Code. There is a paucity of cases on the issue of what constitutes "possession" within the context of § 365(i), and there are no cases where a purchaser was in partial possession of the property to be purchased. Nickels relies exclusively on *In re Summit Land Co.*, 13 B.R. 310 (Bankr. D. Utah 1981) in support of its contention that Wild Waves would not be entitled to relief in § 365(i) because it is not in possession of the entire Pier. Wild Waves cites no applicable case law, but argues that Summit Land is factually distinguishable to the case at bar. The Court heard extensive testimony on the issue of possession. For the reasons set forth below, the Court finds that Wild Waves is in possession of the Pier within the meaning of § 365(i), and thus, may elect to remain in possession of the Pier.

In Summit, the property at issue was "a recreational park with use confined to activities such as hunting, fishing, hiking, and camping." Summit Land, 13 B.R. at 311. The agreement at issue provided that "[n]o structure other than a tent for camping may be erected by members," and that [o]utings to the property are thus intermittent, on vacations and weekends." Id. at 31112. The Summit court found that the buyer was not in possession the property, because (1) its use was intermittent, as the property was used for vacations; (2) it could not make permanent improvements on the property; (3) its use of the property was shared; (4) it held a non-exclusive easement in gross; (5) the property was designed against partitioning; (6) its use of the

property was delegable, in that it could designate others to be members; and (7) its interests were susceptible to speculation, because they were divisible and transferable without restriction. Id. In so holding, the court reasoned that the term "possession" in § 365(1) "suggests a concern for buyers whose connection with the land is more permanent than ephemeral, more continuous than intermittent, more exclusive than shared, and more personal than delegable." *Id.* at 318.

For the following reasons, the facts of Summit Land are distinguishable from the case at bar. First, although the water park is seasonal in nature, Wild Waves remained in possession of the property all year. Second, Wild Waves was entitled to encumber the Pier with a mortgage, which it did. Third, Wild Waves was permitted to build a water park on the Pier. Fourth, although some of the components of the water park are removable, Wild Waves invested substantial sums building a new concrete foundation and otherwise preparing the Pier to hold the water park with these structural components which remain immovable. Fifth, Wild Waves has been operating the water park on the Pier since 2000. Sixth, Wild Waves had access to the remaining 30 percent of the Pier. Specifically, Wild Waves held an office above and utilized storage space below the arcade building. Finally, there is nothing in the Code, caselaw, or legislative history that suggests that exclusive possession is required under § 365(i).

The Court finds that for the purposes of § 365(i), Wild Waves was "in possession" at the time Nickels filed its bankruptcy petition. Therefore, Wild Waves is entitled to the protections outlined in § 365(i).

III. CONCLUSION

Based on the foregoing, the Court finds that the Agreement is executory, and that Nickels may reject the Agreement pursuant to § 365(a), but that Wild Waves is entitled to the protections set forth in § 365(i).

BY THE COURT:
GLORIA M. BURNS
United States Bankruptcy Judge

Footnotes

[1]Although the court in *In re Urban*, 202 B.R. 565, 571 (Bankr. S.D.N.Y. 1994) makes no reference to the doctrine of judicial estoppel, its findings are consistent with the doctrine. In *Urban*, the court noted that "a debtor is precluded from recognizing the validity of a contract for the purpose of rejecting it and then raising defenses to a claim for damages that are wholly inconsistent with the required finding that a contract existed." *In re Urban*, 202 B.R. 565, 571 (Bankr. S.D.N.Y. 1994). Logically, it follows that a creditor would be precluded from recognizing the existence of a valid binding agreement for the purpose of requesting equitable relief and later asserting that the contract was terminated to avoid the debtor rejecting it as executory because the latter is inconsistent with the required finding that the contract existed in order to obtain equitable relief.

[2]Causes of action for breach of contract arise under state law. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220 (2002).

[3]Furthermore, even if Nickels had breached the Agreement pre-petition through anticipatory repudiation, it would not render the Agreement nonexecutory.

Wild Waves relies heavily on *In re Murtishi*, 55 B.R. 564 (Bankr. N.D. Ill. 1985), in support of its contention that a pre-petition breach by Nickels renders the Agreement nonexecutory. Alternatively, Nickels relies heavily on *In re W. & L. Associates, Inc.*, 71 B.R. 962 (Bankr. E.D. Pa. 1987) in support of its contention that a pre-petition breach would not render the Agreement nonexecutory. This Court finds the reasoning set forth by the *W. & L.* court to be more persuasive. Specifically, the Court concurs that

> We certainly cannot agree with the fact that a debtor has breached a contract pre-petition renders it non-executory. Most debtors have breached at least some executory contract pre-petition, and 11 U.S.C. § 365(b) expressly provides them with an opportunity to cure or provide adequate protection to the obligee and retain their contractual rights.

W. & L., 71 B.R. at 966.

[4]The Third Circuit has adopted the business judgment standard. *See In re Fleming Cos. Inc.*, 308 B.R. 6A9, 691 (Bankr. D. Del. 2004) (citing *In re Taylor*, 913 F.2d 102 (3d Cir. 1990)).

[5]Wild Waves relies heavily on Judge Scholl's decision in *In re Walnut Associates*, 145 B.R. 489, 494 (Bankr. E.D. Pa. 1992). In *Walnut Associates*, Judge Scholl

postulated that "if state law does authorize specific performance under the rejected executory contract, it means that the non-debtor should be able to enforce the contract against the Debtor, irrespective of his rejection of it." Judge Scholl cites no authority for this assertion and does not discuss the remedies set forth in § 365(1)(1).

[6]See *In re Ducane Gas Grills, Inc.*, 320 B.R. 341,350, n.12 (Bankr. D.S.C. 2004) (noting that even though Congress overruled the Lubrizol court's holding with regard to § 365(n), otherwise its analysis of § 365 is sound).

[7]If Wild Waves were not in possession of the property, § 365(i) would apply. Section 365(i) provides that

> [a] purchaser that treats an executory contract as terminated under subsection (I) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

11 U.S.C. § 365(j) (2005). Thus, if Wild Waves were not in possession, it would only be entitled to a lien in the amount of any amount it had paid toward the purchase price. *In re Young*, 214 B.R. 905, 911 (Bankr. D. Idaho 1997) (holding that purchasers not in possession "are limited to a lien on the property for that part of the purchase price paid, and a claim in the bankruptcy case for any rejection damages").

Dated: 1/2/2008
No. 06-2671
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: NICKELS MIDWAY PIER, LLC, Debtor;
WILD WAVES, LLC, Appellant

(D.C. Civil Action No. 05-cv-05514).

September 26, 2007, Argued

Before: SCIRICA, Chief Judge, McKEE, RENDELL, BARRY, AMBRO, FUENTES, FISHER, CHAGARES, JORDAN, HARDIMAN and ROTH,* Circuit Judges

SUR PETITION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decisions having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED.

Footnote

*Senior Judge Roth's vote is limited to panel rehearing only.

94 (2)

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SUPREME COURT, U.S.

No. 07-1256

IN THE

Supreme Court of the United States

WILD WAVES, LLC,

Petitioner,

v.

NICKELS MIDWAY PIER, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Nickels Midway Pier, LLC, has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

STATEMENT PURSUANT TO RULE 29.6 ... i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

COUNTER-STATEMENT OF RELEVANT PROVISIONS INVOLVED 1

COUNTER-STATEMENT OF THE CASE ... 2

REASONS FOR DENYING THE PETITION 5

1. The Court Below Did Not Fail To Afford Full Faith And Credit To The Superior Court Opinion 5

2. The Court Below Correctly Found That Wild Waves Is Not Entitled To The Equitable Remedy Of Specific Performance Upon Rejection Of The Oral Contract Of Sale 7

CONCLUSION 11

TABLE OF CITED AUTHORITIES

Page

Cases:

In re Ben Franklin Hotel Assocs.,
186 F.3d 301 (3d Cir. 1999) 10

Centex Homes v. Boag,
128 N.J. Super 385 (Ch. Div. 1974) 8-9

In re Delaney,
203 Bankr. Lexis 1765 (Bankr. D. Mass. 2003) . 8

Dixon v. Smyth Sales Corp.,
110 N.J. L. 459 (E&A 1931) 7

Dover Shopping Center v. Cushman's Sons, Inc.,
63 N.J. Super. 384 (App. Div. 1960) 8

Fleisher v. James Drug Stores, Inc.,
1 N.J. 138 (1948) 10

Friendship Manor, Inc.,
244 N.J. Super. 104 (App. Div. 1990) 9

In re Heckinger Investment Co. of Del.,
274 B.R. 71 (Bankr. D. Del. 2002) 8

Jersey City Redevelopment Agency v. Clean-O-Mat Corporation,
289 N.J. Super. 381 (App. Div. 1996) 9

Cited Authorities

Page

In re Kilpatrick,
160 B.R. 560 (Bankr. E.D. Mich. S.D. 1993) .. 9

Korblin Refrigerated Express, Inc. v. Pitterich,
805 F.2d 96 (3d Cir. 1986) 9

Lubrizo Enterprises, Inc.
v. Richmond Metal Finishers, Inc.,
756 F. 2d 1043 (4th Cir. 1985) 8

Ohio v. Kovacs,
469 U.S. 274, 105 S. Ct. 705,
83 L. Ed. 2d 649 (1985) 9

Studzinkski v. Travelers Ins. Co.,
108 N.J. Super. 416 (Law. Div. 1981) 7

In re Young,
214 B.R. 905 (Bankr. D. Idaho 1997) 8

Statutes:

11 U.S.C. §101(5) 9

11 U.S.C. §365 ..... *passim*

COUNTER-STATEMENT OF RELEVANT PROVISIONS INVOLVED

Bankruptcy Code, 11 U.S.C. § 365(d)(2):

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease or residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

Bankruptcy Code, 11 U.S.C. § 365(i):

(i) (1) if the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) if such purchaser remains in possession –

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any

> obligations of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and
>
> (B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

Bankruptcy Code, 11 U.S.C. § 365(j):

> (j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party had paid.

COUNTER-STATEMENT OF THE CASE

Petitioner, Wild Waves, LLC ("Wild Waves") erroneously contends that this Appeal involves the enforceability of an agreement between Respondent, Nickels Midway Pier, LLC ("Nickels" or "Debtor") and Wild Waves to sell Nickels' amusement pier located in Wildwood, New Jersey. To the contrary, the true issue before this Court is what right or remedy is available to Wild Waves in the event Nickels elects, on remand to the Bankruptcy Court, to reject either or both the

commercial lease ("Lease") and oral contract for sale ("Oral Contract for Sale") with Wild Waves pursuant to 11 U.S.C. § 365 of the United States Bankruptcy Code ("Code").

Originally, Nickels only sought to reject its thirty-one (31) year (including extension options) Commercial Lease with Wild Waves. Prior to a determination on Nickels' Motion to Reject the long term Lease, the Bankruptcy Court granted limited relief from the automatic stay to permit the parties to continue with a trial, which had been pending in the Superior Court of New Jersey, Atlantic County, Chancery Division (the "State Court Action"), to determine the existence of an Oral Contract for Sale between the parties.

Based upon a finding in the State Court Action that an Oral Contract of Sale existed between the parties, Nickels renewed its Motion to Reject to encompass both the Commercial Lease and the Oral Contract for Sale[1]. In ruling on Nickels' Motion to Reject, the Bankruptcy Court treated the Commercial Lease and Oral Contract for Sale as one collective agreement; and found that Wild Waves enjoyed the rights available under Bankruptcy Code § 365(i) because Wild Waves was "in possession" under the Oral Contract for Sale, and authorized Nickels

---

1. Notwithstanding the Motion to Reject, Nickels has preliminarily maintained the position that Nickels has the right to terminate the Commercial Lease and Oral Contract for Sale based upon Wild Waves' pre and post-petition defaults under each of the agreements. Therefore, there would be no agreement or contract to reject. The issues regarding Wild Waves defaults are in the process of being litigated before the Bankruptcy Court at this time.

to reject the Oral Contract for Sale. The Bankruptcy Court also ruled that Wild Waves claimed right to specific performance was pre-empted by the Bankruptcy Code.

On appeal, the District Court found that the provisions of 11 U.S.C. § 365(i) were *not* applicable, based upon the fact that Wild Waves occupied a portion of the Pier under the Commercial Lease, and it was not "in possession" under the Oral Contract for Sale. While acknowledging the Superior Court ruling that a "throughly integrated" agreement existed between Nickels and Wild Waves to sell the Pier, the District Court found that the Commercial Lease and Oral Contract of Sale were two (2) separate and distinct contracts (albeit two components of an intertwined agreement to ultimately sell the entire Pier). The District Court also affirmed the Bankruptcy Court's determination that Wild Waves' claim for specific performance of the Oral Contract for Sale is a "claim," within the meaning of Bankruptcy Code § 101(5), and thus can be discharged in a bankruptcy proceeding.

On appeal, the Third Circuit affirmed the District Court's denial of Wild Waves' claim to specific performance holding that monetary damages were a viable alternative to Wild Waves' claim to specific performance and, therefore, within the definition of a claim dischargeable in bankruptcy. The Third Circuit also affirmed the District Court's decision that the Commercial Lease and Oral Contract for Sale were two separate and divisible portions of the contract relating to the Lease and the sale of the Pier.

REASONS FOR DENYING THE PETITION

1. *The Court Below Did Not Fail To Afford Full Faith And Credit To The Superior Court Opinion.*

Wild Waves attempts to distort the scope and findings contained in the Opinion of the Superior Court by erroneously arguing that the Superior Court held that the Commercial Lease and Oral Contract for Sale were "unitary" and "not divisible." To the contrary, the Superior Court was specifically charged with the limited issue of determining whether an oral contract of sale for the Pier existed between the parties. In so doing, the Superior Court merely found that the Commercial Lease and Oral Contract for Sale were "two aspects of a throughly integrated agreement" of the parties to sell the Pier. The Superior Court's finding of the existence of an Oral Contract for Sale was not disturbed and was given full faith and credit by the Court below.

Consistent with the Superior Court Opinion, the District Court Opinion (affirmed by the Court below) found that Wild Waves had been occupying a portion of the Pier under the Lease and had the right to purchase the entire Pier under an Oral Contract for Sale, which was not exercised prior to Nickels' bankruptcy. The District Court correctly determined that the Lease and the Oral Contract for Sale are independent components of the parties' integrated agreement as to the disposition of the Pier. The District Court found that the Superior Court's use of the term "integrated" was not in the traditional legal sense, but rather, to emphasize the "interrelation of its component parts."

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While the Superior Court's decision in the State Court Action found that the parties had entered into an integrated agreement encompassing both the Commercial Lease and the Oral Contract for Sale, it did not change the fact that they are two separate aspects of the agreement which operate independently.

Indeed, the Superior Court's Opinion acknowledges the fact that the Commercial Lease and Oral Contract for Sale were *two separate and distinct contracts* that were designed to achieve their overall agreement. Judge Seltzer found that the parties had agreed that Wild Waves would first lease a portion of the Pier for the purposes of seeking financing to build the water park pursuant to the terms of the Lease. Thereafter, Nickels would sell the entire Pier to Wild Waves pursuant to the terms of the unexecuted agreement for sale.

As specifically noted by the Court below, neither the Commercial Lease nor the Oral Contract for Sale require compliance with the terms of the other. Each contract was drafted to operate separate and independent of the other. Unlike a traditional lease with a purchase option situation, the Oral Contract for Sale was not contingent upon Wild Waves compliance with the terms of the Lease. A breach by Wild Waves under the Commercial Lease does not terminate Wild Waves' right to purchase under the Oral Contract for Sale. Further, the Oral Contract for Sale does not provide for payments made under the Commercial Lease to be credited to the purchase price of the Pier.

In determining that the Lease and Oral Contract for Sale were two divisible contracts, the District Court

relied upon well settled New Jersey State law. *See Studzinksi v. Travelers Ins. Co.*, 108 N.J. Super 416, 419 (Law. Div. 1981); *Dixon v. Smyth Sales Corp.* 110 N.J.L. 459, 460-61 (E&A 1931). Indeed, an agreement is deemed to be divisible when performance consists of "several distinct and separate items." *Dixon, supra*, 110 N.J.L. at 461.

In viewing the Commercial Lease and Oral Contract for Sale as separate aspects of an interrelated agreement, the Court below did not disturb the ruling of the Superior Court and gave full faith and credit to its finding of the existence of an Oral Contract for Sale.

2. ***The Court Below Correctly Found That Wild Waves Is Not Entitled To The Equitable Remedy Of Specific Performance Upon Rejection Of The Oral Contract Of Sale.***

Wild Waves correctly states in its Petition that rejection of an executory contract under the Bankruptcy Code has the legal effect of a breach. *See* 11 U.S.C. § 365(g). However, Congress did not intend to permit debtors to reject real estate sale contracts only to have the purchaser turn around and enforce the rejected contract under State law. Congress enacted a comprehensive framework to address the rejection of real estate contracts. Under § 365, once a contract is rejected it no longer exists. Sub-sections (i) and (j) specifically address the remedies and options that are available to a purchaser who's contract has been rejected — i.e., treat the contract as terminated and obtain a lien for any payments made on account of the sale contract or remain in possession, pay the purchase

price and receive title. *See In re Heckinger Investment Co. of Del.*, 274 B.R. 71, 97 (Bankr. D. Del. 2002) (finding that preemption is appropriate where the Code comprehensively addresses such claims); *Lubrizo Enterprises, Inc. v. Richmond Metal finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985) ("allowing specific performance would obviously undercut the core purpose of rejection under § 365(a), and that consequence cannot therefore be read into Congressional intent"). Thus, the protection afforded to a purchaser "in possession" under 11 U.S.C. § 365(i)(2)(B) are intended to "compensate a purchaser for its lost right to specific performance." *In re Delaney*, 203 Bankr. Lexis 1765, * 16 (Bankr. D. Mass. 2003).

Bankruptcy Code § 365(i) specifically and comprehensively lays out the options and remedies available to a purchaser if real estate who's contract has been rejected. The State law remedy of specific performance is simply not available to a party such as Wild Waves when there has not been an award of specific performance by the State Court pre-petition. *See In re Young*, 214 B.R. 905, 911 (Bankr. D. Idaho 1997). Here, the State Court specifically held that it was not deciding the issue of specific performance as it was beyond its scope of authority.

Assuming *arguendo* any relevance under the facts of this case, under the substantive law of the State of New Jersey, specific performance relief is not a remedy available where monetary damages would make the non-breaching party whole. *See Dover Shopping Center v. Cushman's Sons, Inc.*, 63 N.J. Super 384, 394 (App. Div. 1960); *Centex Homes v. Boag*, 128 N.J. Super 385, 389

(Ch. Div. 1974); *Jersey City Redevelopment Agency v. Clean-O-Mat Corporation*, 289 N.J. Super 381, 404 (App. Div. 1996). Specific performance is appropriate only when a court cannot arrive at a legal measure of damages with a sufficient degree of certainty that no adequate legal remedy exist. *See Korblin Refrigerated Express, Inc. v. Pitterich*, 805 F.2d 96 (3d Cir. 1986). *See also Friendship Manor, Inc.* 244 N.J. Super 104 (App. Div. 1990) ("specific performance is a discretionary remedy resting on equitable principles and requiring the court to appraise the respective conduct and situations of the parties").

Here, Wild Waves' claim for specific performance can be reduced to monetary damages. In fact, through its own submissions, Wild Waves has quantified and reduced its claim for Nickels' alleged breach to a sum certain by its filing a claim in the Chapter 11 proceeding. The District Court noted that Wild Waves provided a detailed and specific calculation of the damages it would incur if the parties' agreement was rejected.

Code § 101(5) defines a "claim," which includes the right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right is liquidated or unliquidated. Thus, any right, including the right to an equitable remedy, such as specific performance, which can be deduced to monetary damages, is a "claim," even if that right could also be enforced by means of an equitable remedy. *See In re Kilpatrick*, 160 B.R. 560 (Bankr. E.D. Mich S.D. 1993). *See also, Ohio v. Kovacs*, 469 U.S. 274, 280, 105 S. Ct. 705, 708, 83 L. Ed. 2d 649 (1985) ("in some states, a judgment for specific performance may be

satisfied by an alternative right to payment in the event performance is refused; in that event, the creditor entitled to specific performance would have a 'claim' for purposes of proceeding under Title 11"). Specific performance is only available in instances where the remedy at law fails to do justice to the parties. *Fleisher v. James Drug Stores, Inc.*, 1 N.J. 138, 146 (1948). Wild Waves' rights, if any, are provided for and protected under the provisions of § 365(i) and (j).

Wild Waves reliance upon the ruling in *In re Ben Franklin Hotel Assocs.*, 186 F.3d 301 (3rd Cir. 1999) is misplaced and distinguishable from the facts of this case. In the *Ben Franklin* case, the Court's determination as to the availability of specific performance was based upon a finding that monetary payment was not a viable alternative. *Id.* at 306. In this case, however, Wild Waves has not only filed a proof of claim and provided a detailed calculation of its monetary damages on rejection of the contract but also, enjoys a long term lease for the use of approximately 70% of the Pier. *See* District Court Opinion at Note 15. In that regard, the District Court noted that the "fact that a creditor's specific performance remedy is preferable to a damages remedy does not mean that a creditor's right to specific performance cannot be reduced to a claim in bankruptcy." Any other interpretation would render the rejection provisions of Code § 365 meaningless as to many contracts. The Court below correctly found that under the circumstances of this case, monetary damages are viable alternative to specific performance and "the Bankruptcy Code provides a mechanism for addressing the claim for relief."

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Petitioner's request for the issuance of a Writ of Certiorari be denied.

Respectfully submitted,

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